TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946 47.

No. 1188 60

JOSEPH WHITE MUSSER, GUY W. MUSSER, CHARLES FREDERICK ZITTING, ET AL., APPELLANTS,

vs.

THE STATE OF UTAH

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH

FILED MARCH 31, 1947.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 20, 1947.

[fol. 1] [Caption and appearances omitted]

[fol. 2]

IN DISTRICT COURT OF SALT LAKE COUNTY, STATE OF UTAH

INFORMATION—Filed April 21, 1944

Brigham E. Roberts, District Attorney of the Third Judicial District, in and for Salt Lake County, State of Utah, accuses the above named defendants of the Crime of Conspiracy in violation of Section 103-11-1, Utah Code Annotated, 1943, and charges:

That the said above named defendants on and between the first day of June, 1935, and the first day of March, 1944, at the County of Salt Lake, State of Utah, did wilfully and unlawfully agree, combine, conspire, confederate and engage to, with and among themselves and to and with divers other persons to your affiant unknown, to commit acts injurious to public morals as follows, to-wit:

That the said above named defendants at the time and place aforesaid, did wilfully and unlawfully agree, combine, conspire, confederate and engage to, with and among themselves and to and with divers other persons to the District Attorney unknown, to advocate, promote, encourage, urge, teach, counsel, advise and practice polygamous or plural marriage and to advocate, promote, encourage, urge, counsel, advise and practice the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof, did commit the following overt acts:

1. That the said defendants from the first day of June, 1935, to the first day of March, 1944, at the County of Salt Lake, State of Utah, did publish and cause to be published once each month a pamphlet known as "Truth."

2. That the said defendants from the first day of June, 1935, to the first day of March, 1944, at the County of Salt Lake, State of Utah, did distribute and cause to

be distributed once each month, a pamphlet known as "Truth."

3. That the said defendants on the first day of July, 1942, purchased a house located at 2157 Lincoln Street in Salt Lake City, Utah.

4. That the said defendants from the first day of July, 1942, to the first day of March, 1944, made payments of money on the purchase price of a house located at 2157 Lincoln Street, Salt Lake City, Utah.

5. That the said defendants at divers times within Salt Lake County, State of Utah, between March 1, 1940 and March 1, 1944, did perform plural or polygamous marriage.

6. That the said defendants in Salt Lake County, State of Utah, between June 1, 1940 and March 1, 1944, did practice unlawful cohabitation, to-wit: the living of one male person with more than one women, or did aid and abet therein.

[fol. 3] 7. That the said defendants in Salt Lake County, State of Utah, between April 1, 1940, and March 1, 1944, did collect money.

8. That the said defendants at divers times from April 1, 1940 to March 1, 1944, did make speeches at meetings advocating the practice of polygamy, plural marriages and unlawful cohabitation.

9. That the said defendants at Salt Lake County, State of Utah, in 1942 and 1943, attempted to convert Helen Smith to believe in and to live in polygamy.

10. That the said defendants at Salt Lake County, State of Utah, in 1941, attempted to convert June Greenwood Waters Timpson to believe in and live in polygamy.

11. That in 1941 at the County of Salt Lake, State of Utah, the said defendants attempted to convert Leslie W. Brockelhurst to believe in and practice polygamy, plural marriages and unlawful cohabitation.

12. That in 1941 at the County of Salt Lake, State of Utah, the said defendants attempted to convert Gus-

tav A. Ponts to believe in and practice polygamy, plural marriages and unlawful cohabitation;

contrary to the provisions of the Statute of the State aforesaid, in such cases made and provided, and against the peace and dignity of the State of Utah.

(Signed) Brigham E. Roberts, District Attorney of the Third Judicial District in and for Salt Lake County, State of Utah.

[File endorsement omitted]

[fol. 4] In District Court of Salt Lake County

Motion to Quash—Filed May 5, 1944

Come now the defendants and move the Court (a) to quash the information; (b) to discharge the defendants; and (c) to exonerate their bondsmen, on the following grounds:

1

That the information does not charge the defendants with the commission of a public offense.

2

That the information contains a statement of matter which constitutes a legal justification of the offense charged.

(Signed) J. H. McKnight, Knox Patterson, Claude T. Barnes, Attorneys for Defendants.

Received copy this 5th day of May, 1944.
(Signed) Brigham E. Roberts, District Attorney.

[File endorsement omitted]

[fol. 5] In District Court of Salt Lake County

Order Denying Motion to Quash, etc.—September 5, 1944

Defendants' motion to suppress certain evidence and motion to quash comes now on for hearing, the defendants being present in person and represented by J. H. McKnight, Claude T. Barnes and Knox Patterson as counsels and

B. E. Roberts, and H. D. Lowry appearing in behalf of the State. Whereupon said motions are argued to the Court by respective counsel and submitted, and the Court being fully advised in the premises, orders that said motion to suppress is denied. It is further ordered that the said motion to quash is denied. Comes now Claude T. Barnes of counsel for defendant and enters a plea of not guilty and a plea of once in jeopardy for said defendants and each of them. Whereupon said case is set for trial on September 15, 1944. Comes now counsel for defendants and moves the Court for an order requiring the State to bring unto Court all of the exhibits and evidence, seized, and surrender all such evidence that does not have a bearing on said case, and said motion is denied.

[fol. 6] IN DISTRICT COURT OF SALT LAKE COUNTY

MOTION TO DISMISS AS TO ALL DEFENDANTS—Filed October 2, 1944

Come now the defendants named herein, and jointly make this their motion to dismiss this action at the close of the evidence offered by the State, the State having rested its case, and respectfully move the Court as follows:

That the above entitled action be now dismissed as against all of the defendants named therein.

For grounds for said motion the defendants rely upon the files and the record herein; the minutes of the above entitled Court, the laws of the State of Utah; the First and Fourteenth Amendments to the Constitution of the United States of America; Sections 4, 15, 24 and 27 of the First Article of the Constitution of the State of Utah, and the following statement, viz:

STATEMENT

The evidence now received herein, as at the close of the State's case in chief, is insufficient to warrant or to sustain any verdict of guilty as against these defendants.

No more has been shown by the evidence than a belief in a religious practice, dogma or theory.

The Court, or any jury, may not pass upon the morality or immorality of a religious practice.

Neither the Court, nor any jury, may pass upon the morals or immorality of a religious belief or dogma, or any exercise thereof.

Neither the Court, nor any jury, may pass upon the truth or untruth of any religious tenet or dogma, or religious exercise of the same.

J. H. McKnight, Claude T. Barnes and Knox Patterson, Attorneys for Defendants; By (Signed) Knox Patterson.

E. D. Hatch, of Counsel.

[File endorsement omitted]

[fol. 7] In District Court of Salt Lake County

Defendants' Requested Instructions to Jury

Instruction

XVI

You are instructed, gentlemen of the jury, that the advocacy of the truth of a religious doctrine, whether by an individual or a group acting in concert, constitutes no offense punishable by law.

Such cannot be found to constitute any criminal conspiracy.

Instruction

XXIV

You are instructed, gentlemen of the jury, that no hatred of government or advocacy of change in its laws, unaccompanied by force, and but expressed by public or private debate or discussion, can form any overt act evidencing any criminal conspiracy. (2 Bp. Cr. L. p. 125, Sec. 224.)

And, further: Where the subject of such debate or discussion, its morals, its truth, its desirability, its approval or command by the Almighty, and its entire subject is of religious faith or belief—such is absolutely immune from any prosecution whatsoever.

Further, such religious doings cannot be found to be any element of or any evidence of any crime or criminal conspiracy.

Defendants' Requested Instruction to the Jury

No. 36

You are instructed, Gentlemen of the Jury that:

The mere advocacy of a religious dogma, belief or practice, even though the same be prescribed by the civil law, constitutes no offense cognizable under our laws, or for which our laws may punish.

Hence, you may not consider in your deliberations any evidence upon that item of the alleged overt acts set out at [fol. 8] paragraph 8 of the same in the information.

Defendants' Requested Instruction to the Jury

No. 42

You are instructed, Gentlemen of the Jury, that this whole prosecution and the whole of the case arose out of and primarily involves a belief in a marriage type and form had on the one hand by the defendants and, on the other hand, denounced by a great majority of the general public, and in particular by the Church of Jesus Christ of Latter Day Saints, the so-called "Mormon Church".

The doctrine of marriage so believed by these defendants is an integral part of the alleged "command of God" contained in the "Doctrine and Covenants", a book of absolute truth as believed in by both these defendants and the said so-called "Mormon Church".

Being such, you are instructed that this case, inescapably, involves the Constitutional rights of freedom to believe and advocate a religious dogma, belief and faith, and that you must so give full consideration of the evidence in the light of the religious issues so in this case.

In such regard, you are further instructed that these defendants have full right to preach, advocate belief in, and denounce unbelievers in the religious doctrine of "celestial" —or polygamous—marriage as by them espoused and believed,—and to so do orally and in writing,—in private or in public,—in small assemblies or large gatherings of people generally.

That these defendants may have been here shown to have so done, under their right to so do as aforesaid, cannot be considered by you as in any sense being any proof of the charge here made against them, or any one of them.

{fol. 9} IN DISTRICT COURT OF SALT LAKE COUNTY

COURT'S INSTRUCTIONS TO THE JURY

Instruction No. 1

You are instructed that the defendants above-named are charged by the information in this case with the crime of conspiracy, in violation of Section 103-11-1, Utah Code Annotated, 1943, committed as follows, to-wit:

That the said above named defendants on and between the first day of June, 1935, and the first day of March, 1944, at the County of Salt Lake, State of Utah, did wilfully and unlawfully agree, combine, conspire, confederate and engage to, with and among themselves and to and with divers other persons to your affiant unknown, to commit acts injurious to public morals as follows, to-wit:

That the said above named defendants at the time and place aforesaid, did wilfully and unlawfully agree, combine, conspire, confederate and engage to, with and among themselves and to and with divers other persons to the District Attorney unknown, to advocate, promote, encourage, urge, teach, counsel, advise and practice polygamous or plural marriage and to advocate, promote, encourage, urge, counsel, advise and practice the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof, did commit certain overt acts.

Insofar as there is any competent evidence in support of the overt acts alleged they are as follows and are set forth in the information as follows:

First. That the said defendants from the first day of June, 1935, to the first day of March, 1944, at the County of Salt Lake, State of Utah, did publish and cause to be published once each month a pamphlet known as "Trath".

Second. That the said defendants from the first day of June, 1935, to the first day of March, 1944, at the County of Salt Lake, State of Utah, did distribute and cause to be distributed once each month a pamphlet known as "Truth".

Third. That the said defendants on the first day of July, 1942, purchased a house located at 2157 Lincoln Street in Salt Lake City, Utah.

Fourth. That the said defendants at Salt Lake County, State of Utah, in 1942 and 1943, attempted to convert Helen Smith to believe in and to live in polygamy.

Instruction No. 4

* * * * * * *

You are instructed that an agreement between two or [fol. 10] more persons to advocate, promote, encourage, teach, counsel, advise, and practice polygamous or plural marriages, and to advocate, promote, encourage, urge, counsel, advise, and practice the cohabiting of one male person with more than one woman is as a matter of law an agreement to do an act injurious to public morals, and if in addition thereto and pursuant to such an agreement said two or more persons do one or more overt acts in furtherance of said agreement, said acts being reasonably designed to further in any appreciable degree the accomplishment of the purpose of such agreement, the crime of conspiracy is made out.

Instruction No. 5

Before you can find the defendants, or any of them, guilty of the offense charged in the information, you must find from the evidence, beyond a reasonable doubt the following:

First: That on or between the first day of June, 1935, and the first day of March, 1944, at the County of Salt Lake, State of Utah, two or more of the defendants conspired, agreed and confederated among themselves to advocate, promote, encourage, teach, counsel, advise and practice polygamous or plural marriages and to advocate, promote, encourage, urge, counsel, advise and practice the cohabiting of one male person with more than one woman;

Second: That between April 21, 1941 and April 21, 1944, the date of filing of the information, at least one or more of the following overt acts was committed:

1. That the said defendants at the County of Salt Lake, State of Utah, did publish and cause to be published once each month a pamphlet known as "Truth".

2. That the said defendants at the County of Salt Lake, State of Utah, did distribute and cause to be distributed once each month, a pamphlet known as "Truth".

3. That the said defendants purchased a house located at 2157 Lincoln Street in Salt Lake City, Utah.

4. That the said defendants at Salt Lake County, State of Utah, attempted to convert Helen Smith to believe in and to live in polygamy.

[fol. 11] Third: That any one or more of the overt acts set forth in paragraph second hereof which you may find beyond a reasonable doubt was committed, was committed in furtherance of the agreement described in paragraph first hereof, and was reasonably designed to accomplish to some appreciable degree the object of said agreement, if any.

If the State has failed to prove to your satisfaction beyond a reasonable doubt any one or more of the foregoing items numbered first, second and third then you cannot convict the defendants, or any one of them.

Instruction No. 9

You are instructed, gentlemen of the jury, that religious belief may be had and entertained; may be discussed, both privately and publicly, by the believer; may be urged as true and moral; may be preached and expounded, all without any offense against the law.

The constitutional guaranty of religious freedom, however, does not go to the extent of cloaking anyone with immunity for the violation of any law of the State of Utah under a claim that such violation was pursuant to a religious conviction, however sincere.

[fol. 12] IN DISTRICT COURT OF SALT LAKE COUNTY

Bill of Exceptions

PROSPECTIVE JURORS—VOIR DIRE

The Court: Mr. McDonald, did you read about this case in the paper?

Mr. McDonald: Yes, sir.

The Court: Discuss it with others?

Mr. McDonald: Yes.

The Court: Express an opinion to others?

Mr. McDonald: Yes sir.

The Court: Express an opinion to others?

Mr. McDonald: Yes sir.

The Court: Have you got an opinion now as to the merits of the case?

Mr. McDonald: Yes sir.

The Court: Is your opinion based on anything other than newspaper reports and the common notoriety of the case? Do you have other sources of information?

Mr. McDonald: No. That is the only way—my opinion is based, on newspapers.

The Court: Do you now have an opinion about the case?

Mr. McDonald: Yes sir.

The Court: Well, do you think your opinion is such that it would disable you from being fair and impartial to both sides of the case, if you should be one of those selected to sit?

Mr. McDonald: It could be changed; as the case went on it could be changed.

The Court: Am I to understand, Mr. McDonald, if you felt the State failed to maintain the burden that I have said here they have got, of proving the defendants guilty beyond a reasonable doubt, you would feel they were entitled to acquittal and acquit them; is that right?

Mr. McDonald: Yes.

The Court: On the other hand, if you thought the State [fol. 13] had maintained that burden, and you were satisfied from the evidence here that the State had proved the defendants' guilt beyond a reasonable doubt, you would return a verdict of Guilty?

Mr. McDonald: Yes sir.

Mr. Barnes: We challenge for cause, if the court please, on the ground it would require evidence to change his opinion, whatever it is.

The Court: The challenge is denied.

Mr. Barnes: Take an exception.

The Court: Mr. Hollingshead, have you received any information of this case from sources other than newspapers and common gossip?

Mr. Hollingshead: No sir.

The Court: Did you ever express an opinion about the merits, to anyone?

Mr. Hollingshead: Probably have.

The Court: You don't remember now if you have or have not?

Mr. Hollingshead: I don't.

The Court: But you have discussed it?

Mr. Hollingshead: Yes.

The Court: Have you got an opinion at this moment about the merits of the case?

Mr. Hollingshead: I probably have.

The Court: Is it such an opinion, such an unalterable opinion, that it would not yield to evidence presented here in the case; that is to say, is it such a fixed conviction with you at this moment, that you feel that regardless of what the evidence was, you would follow the opinion you have now?

Mr. Hollingshead: I think I would be open minded.

The Court: And you would be fair to the State and fair to these defendants, and try the case on the evidence produced here in court, and shut out everything else?

Mr. Hollingshead: Yes.

Mr. Patterson: I would like to say upon the information we have from these last three jurors, we could not intelli- [fol. 14] gently exercise a challenge for implied bias or actual bias. We would like to know, if they have an opinion, whether someone would have to produce some evidence to remove that opinion.

The Court: I asked them that.

Mr. Patterson: I don't get it out of the court's examination. They start out with an opinion. Now, someone is at a disadvantage. I think we ought to know whether we, or the State——

The Court: I feel this way about it, Mr. Patterson: I don't see how any intelligent person can read a newspaper

article about anything without getting some kind of an opinion about it; and the law recognized that, and the State statute says that a juror is not disqualified because he has either formed or expressed an opinion, when that opinion is based solely upon newspaper accounts, or common notoriety, if he can go further and say that in spite of that opinion he can decide the case on the evidence and facts that are produced in court, and the law applicable thereto. Now, I think that correctly states it.

Mr. Barnes: We challenge this last juror for cause, if the court please, stated bias.

The Court: Have you a question of procedure there, Mr. Roberts?

Mr. Roberts: No, I don't. We resist the challenge.

Mr. Barnes: We take the position anybody that comes into this case as a juror, who is going to require evidence, one way or the other, to alter his opinion it is to the disadvantage of one or the other of us, either the State or ourselves.

Mr. Roberts: But then, if the juror says he has an open mind and can arrive at his verdict in accordance with the evidence and the instructions of the court, that is all any juror can do.

Mr. McKnight: That isn't what he said. Your Honor interrogated him to this point, if evidence were introduced, would you be willing to lay aside your opinion. If it takes evidence to remove his opinion, he is not eligible to sit as a juror. If he can come into court without hearing any evidence and have an opinion—if it takes evidence to change [fol. 15] that mind, he is not eligible. That is the law.

The Court: Not in this court, I am sorry to say. The challenge is denied.

Mr. Barnes: Exception.

The Court: Mr. Decker, have you heard about this case before coming to court?

Mr. Decker: Yes sir.

The Court: You read about it in the papers?

Mr. Decker: Yes sir.

The Court: Discussed it with others?

Mr. Decker: Yes sir.

The Court: Did you ever form an opinion about the merits of the case?

Mr. Decker: I couldn't very well help it. There is so much about the case down my way.

The Court: Did you ever express an opinion, that you recall now, about the guilt or innocence of these defendants?

Mr. Decker: It has been discussed to me. I took a mum part in it, I guess.

The Court: Mr. Decker, have you got an opinion at this time about the merits of this case?

Mr. Decker: Yes, I have.

The Court: The guilt or innocence of the defendants?

Mr. Decker: Yes.

The Court: Is it such an opinion that it would not yield to the facts presented here in the court room before you for your consideration, as a juror?

Mr. Patterson: Except to that question for this reason: If it would yield to the facts. If he has an opinion such as would require evidence to make him yield, that does not qualify the juror. Of course, we might be able to produce evidence to over-balance the opinion, but we should be able to start out here with a man whose mind is entirely unbiased [fol. 16] and has no opinion. And the question does not tend to qualify the juror.

The Court: I can't get blank minds for you, Mr. Patterson. These people have all read about this case, and I can't understand why anyone should contend that you could read about a case of this nature, or any case, or any newspaper article, without getting some opinion.

Mr. Patterson: Isn't that what we are entitled to, men whose minds will yield to evidence, regardless of any opinion they now have.

The Court: That is what I am trying to get.

Mr. Patterson: He tells you first he has opinion. In other words, if he is against us, we must first start out to remove that opinion.

The Court: Maybe he is against the State.

Mr. Patterson: I don't care which he is against.

The Court: I don't care, either. I cautioned the jurors not to state any opinions that they have. I want to know if they have got opinions, but I certainly don't want to know, and I don't want any juror to indicate he has an opinion for or against the defendants, or for or against the State, and I have carefully and purposefully avoided ascertaining what any of their opinions might be.

Do you think you can find the question I last asked Mr. Decker, Mr. Moulton?

Mr. Barnes: We challenge Mr. Decker for cause.

The Court: The challenge is denied at this time, Mr. Barnes. You may renew it when I get through talking with him, if you desire.

(Reporter read last question put to Mr. Decker.)

The Court: Is that question intelligible to you?

Mr. Decker: It would take evidence to change my opinion. Does that answer it? I have formed an opinion. I couldn't help it.

Mr. Barnes: We renew the challenge.

The Court: All right, Mr. Decker, I will ask you this other question: The opinion you now have—could the opinion you now have be removed by the evidence you heard in this court, and altered and changed?

Mr. Decker: Yes sir, by evidence it could.

[fol. 17] The Court: Am I to understand, then, you are willing to try this case upon the evidence heard in this court-room, and if you feel the State has proved the defendants guilty beyond a reasonable doubt to your satisfaction, you will convict them?

Mr. Decker: Yes sir.

The Court: And if you feel, after hearing all the evidence, and the court's instructions, that the State has failed to maintain that burden, that is, the burden of proving their guilt beyond a reasonable doubt, you will acquit them?

Mr. Decker: Yes sir.

Mr. Patterson: The answer to that question is "Yes". The juror nodded his head.

Mr. Decker: "Yes sir", I said.

Mr. Patterson: We except to both questions.

Mr. Roberts: Could this question be put: Is this opinion such as you could lay it aside and try this case fairly and impartially upon the evidence that is introduced, and render a verdict in accordance with that evidence and the instructions of the court.

Mr. Patterson: That question wouldn't be proper because it appeals to a man's prejudice.

The Court: I thought I covered that. I intended to. I may not have. I intended to, and I will endeavor to cover it now.

Is your opinion such, Mr. Decker, that you could lay it aside and consider this case upon the evidence presented here, and the instructions of the court, and finally render a fair and impartial verdict, based solely upon the evidence produced herein the court room?

Mr. Decker: By the evidence, yes sir.
Mr. Barnes: We renew our challenge for cause.
Mr. Roberts: We resist.
The Court: The challenge is denied.
Mr. Barnes: Exception.

. . . . . .

[fol. 18] The Court: Mr. Reed Arnold, have you read about the case before coming into court today?
Mr. Arnold: Yes sir.
The Court: Did you ever express an opinion to anyone about this case?
Mr. Arnolds: I wouldn't be surprised.
The Court: But if you did, you have no definite recollection of having done so, that is, at this time?
Mr. Arnold: No.
The Court: Is that a fact?
Mr. Arnold: That is right.
The Court: Have you any other source of information about this case other than the public press and the people talking about it?
Mr. Arnold: Yes sir.
The Court: Have you got an opinion at the present moment about the merits of this case?
Mr. Arnold: I think it is a fine case to try.
The Court: What?
Mr. Arnold: It would be a fine case to try.
The Court: I don't know what you mean by that. Have you an opinion as to whether or not these defendants are guilty or innocent of this change?
Mr. Arnold: I have no definite information on that.
The Court: I didn't ask if you had any information. I asked you if you have an opinion as to whether or not they are guilty or innocent. This is a serious business.
Mr. Arnold: Pardon me, Judge, if I appear flippant at all in the matter, Judge. I didn't intend to.
The Court: What do you think about it. Have you an opinion as to whether or not these defendants are guilty or innocent of this crime of which they are charged?
Mr. Arnold: I am—or I have, rather.
The Court: You have such an opinion. Is that opinion [fol. 19] of such fixity in your mind that you think it would not yield to the evidence produced here in court, even

though the evidence was contrary to the opinion which you now hold?

Mr. Arnold: No sir. I think I would be unbiased in the matter.

The Court: You think you could be fair and impartial?

Mr. Arnold: Yes sir.

The Court: To both the defendants and the State?

Mr. Arnold: Yes sir.

The Court: Now, you indicated you had some source of information other than the public press, or common gossip or notoriety.

Mr. Arnold: Probably, Judge, I should explain I am clerk in the Oquirrh Stake of Zion, and we occasionally have these things come up.

The Court: You are clerk where?

Mr. Arnold: Oquirrh Stake in the Church of Jesus Christ of Latter-day Saints.

The Court: That doesn't disqualify you. Nobody is going to be disqualified in this case because they are, solely because they are members of the L. D. S. Church. You might as well understand me now.

Mr. Barnes: I think the gentleman already stated he had already tried these cases in a church capacity.

Mr. Arnold: Mr. Barnes, you are wrong.

The Court: I am going to interrogate him further on that, Mr. Barnes.

Mr. Arnold, did you assist in the investigation of these cases in any way, or provide anyone with any information about them, or in any way participate in any of the activities leading up to the placing of this charge against these defendants?

Mr. Arnold: No sir. Would you restate the forepart of that question?

The Court: I say, did you assist in the investigation of these people?

Mr. Arnold: These people here?

The Court: These people, on the particular charge?

[fol. 20] Mr. Arnold: No sir.

The Court: Did you ever participate in any of your proceedings in your church where any of these people were involved?

Mr. Arnold: No sir, except indirectly.

Mr. McKnight: What does he mean where he got his information outside of the public press?

The Court: You are not going to be a witness in this case?

Mr. Arnold: No sir.

The Court: Do you know anything about this particular case, then, Mr. Arnold, and these defendants, the crime they are charged with, and this particular charge, other than you have read in the public press, and what you have heard discussed?

Mr. Arnold: Judge, I am not trying to get out of this jury service, if that is what you have in mind.

The Court: No; I don't mean to imply you are, since we understood each other.

Mr. Arnold: It so happens I am quite well acquainted with one who is related, by marriage, to one of these gentlemen, and I have heard him express his opinion.

The Court: And has that influenced you?

Mr. Arnold: I feel his word is just as good as any I know of.

The Court: We are kind of going around in a circle. Did I understand you correctly when you said apart from any information you might have now about these cases, that you, none the less, could be fair and impartial to these defendants and to the State?

Mr. Arnold: I think I could do that.

The Court: And if you are selected as one of these jurors, you could sit here and decide the case solely on the evidence produced in the court room, and the law applicable thereto?

Mr. McKnight: We challenge the juror for cause.

The Court: I don't think that challenge should be allowed.

[fol. 21] Mr. Roberts: The State resists that challenge.

The Court: I don't think it should be allowed. The challenge is disallowed.

Mr. McKnight: Exception.

CATHYRN LUCY COLLINWOOD COSGROVE.

Cross examination.

By Mr. Barnes:

Q. Mrs. Cosgrove, what is your full name.
A. Cathyrn Lucy Collinwood Cosgrove.
Q. Are you married now to Mr. Cosgrove?
A. I am.
Q. Where do you live?
A. San Diego, California.
Q. How long have you lived there?
A. Since June of this year.
Q. You have stated here that you attended various meetings at which these defendants were present. I will ask you if, at those meetings you heard what is commonly known as the Word of Wisdom taught?
A. I have heard it taught in meetings.
Q. What did you understand the Word of Wisdom to be?
A. I understood the Word of Wisdom to embrace the fact that there should not be smoking or drinking by the members of the church.
Q. And was that generally observed by the people you saw there?
A. Generally, but not entirely.
Q. Yes. And they were also taught to abstain from liquor?
A. Well, that is part of the Word of Wisdom, yes sir.
Q. And also tea and coffee?
A. Yes sir.
Q. Was it your observation among this group that quite [fol. 22] generally they observed that Word of Wisdom?
A. Well, there were quite a few smokers. I have seen them all drinking— not all of them, I should say, but I have seen a lot of them drinking, and most of them drank coffee, that I knew of.
Q. But generally their daily lives you observed that they did observe this Word of Wisdom?
A. Observed it to the degree that they felt they should observe it.
Q. They felt they should do it?
A. Or whatever they thought the Word of Wisdom applied to them.

Q. At these meetings, the group were taught chastity and virtue?

A. Yes sir.

Q. Were they taught it was an unpardonable sin for which the death penalty should be imposed if a man were unfaithful to his wife?

A. I wouldn't say the death penalty.

Q. Well, a very severe penalty should be imposed; is that correct?

A. I couldn't say to that.

Q. Did you hear something about a spiritual death penalty if such thing took place?

A. I don't ever recall a death penalty.

Q. You recall a penalty of some kind?

A. Yes sir.

Q. Were they taught Christianity in these meetings?

A. Yes sir.

Q. And honesty?

A. Yes sir.

Q. And uprightness?

A. Yes sir.

Q. Were they taught prayers, to be prayerful?

A. Yes sir.

Q. Did they habitually, in the families you visited, have family prayers?

A. Yes sir.

Q. Were the children made to say their prayers before they went to bed?

[fol. 23] A. I imagine so. I never had that in the family I was in. The children weren't big enough.

Q. Did they open their meetings with prayer?

A. Yes sir.

Q. And closed them with prayer?

A. Yes sir.

Q. And in their meetings did they use the long established Mormon hymn books?

A. Yes sir.

Q. No other hymn book?

A. Yes, they had one other book that they sang from.

Q. You refer to a Sunday School hymn book?

A. I refer to the Sunday School hymn book and also a book with a green cover that they sang from.

Q. But that is called the Hymn Book of the Church of

Jesus Christ of Latter-day Saints, commonly called the Mormon Church?

A. I had only seen the book in the group, so I hadn't seen it at any other church.

Q. Do you know what is known as the M.I.A. Song Book of the Mormon Church?

A. I have heard of it, yes.

Q. Was that used?

A. I do not recall.

Q. At any rate, it wasn't the hymn book published by these people?

A. No sir.

Q. Were they taught the principle of Faith in God?

A. Yes sir.

Q. Were they taught the principle of Repentence of One's Sins?

A. Yes sir.

Q. Were they taught the principle of Baptism by Immersion for the forgiveness of Sins?

A. Yes sir.

Q. Were they taught, and I refer to the children and of the group, were they taught the Atonement of Christ?

[fol. 24] A. Yes sir.

Q. And why Christ came onto this earth?

A. Yes sir.

Q. Were they taught the Book of Mormon was the divine word of God?

A. Yes sir.

Q. Were they taught the Doctrine and Covenants was the divine word of God?

A. Yes sir.

Q. Were they taught concerning Christ's first coming on the earth?

A. Yes sir.

Q. And of His second coming?

A. Yes sir.

Q. And that they might look forward to the millennium when He would reappear?

A. Yes sir.

Q. Were they taught concerning the United Order?

A. Yes sir.

Q. And "United Order," by that you refer to a condition in which people live more or less together and share property, share their woes with their happinesses, together?

A. Yes sir.

Q. And you stated that they were taught the principle of tithing?

A. Yes sir.

Q. Were they taught concerning the Twelve Apostles as of old and the present Twelve Apostles?

A. We knew of their existence and we knew they were there in the church proper, but they didn't follow them.

Q. You were taught the original Twelve Apostles of Christ's Church?

A. Yes.

Q. Were you taught of the patriarch of old?

A. Yes sir.

Q. Were you taught that men on this earth have their free agency?

A. Yes sir.

Q. And that they were given the privilege, by the Lord, [fol. 25] to choose between good and evil?

A. Yes sir.

Q. And that they should choose the good?

A. Yes sir.

Q. Were they taught the principle of Revelation, that the Lord is now speaking through His Priesthood here on earth and giving His voice to the people?

A. Yes sir.

Q. They were taught that that is the living principle of Christianity; is that right?

A. That is right.

Q. Were they taught of the Gathering of Israel?

A. Yes sir.

Q. In the last days. As a matter of fact, these references to plural marriage were very incidental, were they not, Mrs. Cosgrove?

A. No sir.

Q. Were they taught concerning the Godhead and the Father and the Son and the Holy Ghost?

A. Yes sir.

Q. And that permeating everything is the spirit of the Lord and the Holy Ghost throughout all matter?

A. Yes sir.

Q. Were they taught the life of Joseph Smith as a Prophet of God?

A. Yes sir.

Q. Were they taught that the Bible is a divine work of the Lord?

A. In so far as it is translated correctly.

Q. In so far as it is translated correctly. And, by the way, those are the exact words of the teachings of the Prophet Joseph Smith; is that correct?

A. Yes sir. They also used the Bible of the Re-Organized Church.

Q. You are familiar with the Articles of Faith that are put out by the Prophet Joseph Smith?

A. I have studied them.

Q. In which those words appear?

A. Yes sir.

Q. "We believe in the Bible, we believe in the Word of [fol. 26] God so far as it is translated correctly."

A. Yes sir.

Q. And they were taught that?

A. Yes sir.

Q. Were they taught the principle of laying on of hands for the healing of the sick?

A. Yes sir.

Q. Is there in this room one man whom you saw cured by the laying on of hands of paralysis?

Mr. Roberts: Object to that as immaterial, irrelevant, a conclusion, and not proper cross examination.

The Court: Objection sustained.

Q. One of the defendants.

Mr. Roberts: We object to that as being immaterial, irrelevant and not proper cross examination.

The Court: Objection sustained.

Q. Were they taught concerning the priesthood and the various officers and offices of the priesthood?

A. Yes sir.

Q. Were they taught to take the sacrament as a figurative representation of the Lord's atonement, and so forth?

A. Yes sir.

Q. Did they regularly have the sacrament in their Sunday School meetings?

A. No sir; the sacrament was once a month.

Q. Once a month. That was the sacrament meeting; is that right?

A. Yes sir.

Q. Were they taught concerning the resurrection and the belief in the resurrection?

A. Yes sir.

Q. That all men would be resurrected?

A. Yes sir.

Q. And that they would be judged in the hereafter in [fol. 27] accordance with their deeds here on earth?

A. Yes sir.

Q. And those who had done evil would be punished accordingly?

A. Yes.

Q. Those who had done good would receive higher glory than those who had done evil?

A. Yes sir.

Q. Were they taught to observe the Sabbath Day and keep it holy?

A. They were taught it, yes sir.

Q. Did these meetings occur on the Sabbath Day?

A. Some meetings occurred on the Sabbath Day.

Q. Were they taught concerning work in the Temples of the Lord?

A. Well, they were taught concerning it, but they didn't do such.

Q. Were they taught that on this earth are certain individuals who have never had the privilege of listening to the gospel of the Lord; were they taught that, and that others had died who had never had that privilege; is that right?

A. Yes.

Q. And that there would be such a thing as baptism for the dead?

A. Yes.

Q. And that by reason of that baptism those who had passed away without the privilege of hearing the Lord's word would have it taught to them in Paradise?

A. They were taught that, but they did not do it.

Q. Yes, but they were taught that?

A. Yes sir.

Q. Were they taught that the Pearl of Great Price was the word of the Lord?

A. Yes sir.

Q. And that is another book written by the Prophet Joseph Smith?

A. That I couldn't say.

Q. Were they taught to study the geneology of their ancestors, so that those who had died without receiving knowledge of the word of the Lord could be baptized for by living people?

[fol. 28] A. They were taught that the last few months I was in the group.

Q. That is what you refer to by the "Geneology Class"; is that right?

A. Yes sir.

Q. Now, you were a member of the Mormon Church before you met Cleveland?

A. Yes, I was.

Q. Where were you born?

Mr. Roberts: We object to this as immaterial, irrelevant and not proper cross examination.

The Court: Objection overruled.

Q. Go ahead?

A. I was born in Garfield, Utah.

Q. Of Mormon parentage?

A. Yes sir.

Q. Then you had been familiar all your life with these books that they mentioned; is that right?

A. Some of them.

Q. You mentioned a book called Celestial Marriage by Musser and Broadbent, that was read to you by Mr. Cleveland. I show you a book, and do you recognize it. Is that the book?

A. This is three books.

Q. Yes, three books.

A. The book I had read to me was a very small book, and it was Fred's own book. It was just Celestial Marriage.

Q. Celestial Marriage. And that is the first one here. Is this it here?

A. Yes sir.

Q. Did Fred read this to you, and I am only going to read a short statement; being an extract from a discourse by Orson Pratt, delivered at a Semi-Annual Conference, October 7, 1874, reported in the Journal of Discourses, Volume 17, Page 223:

> "Why do Latter-day Saints Practice Polygamy: This is a plain question. I will answer just as plainly. It is because we believe with all the sincerity of our

hearts, as has been stated by former speakers from this [fol. 29] stand, that the Lord God who gave revelations to Moses approving polygamy, has given revelations to the Latter-day Saints not only approving it, but commanding it, as He commanded Israel in ancient times.

"Now having said so much in relation to the reason why we practice polygamy, I want to say a few words in regard to the revelation on polygamy. God has told us Latter-day Saints that we shall be condemned if we do not enter into that principle, and yet I have heard, now and then, a brother or sister saying, 'I am a Latter-day Saint, but I do not believe in polygamy.' Oh, what an absurd expression, what an absurd idea. A person might as well say 'I am a follower of the Lord Jesus Christ, but I do not believe in Him.' One is as consistent as the other. Or a person might as well say 'I believe in Mormonism and in the revelation given through Joseph Smith, but I am not a polygamist, and I do not believe in polygamy.' What an absurdity. If one portion of the doctrine of the Church is true, the whole of them is true."

Is that what he read to you?

A. I know that he has read it to me, but whether or not he read it that night, I couldn't tell.

Q. You know he has read it to you on various occasions?

A. Oh yes.

Q. Now, you stated that he read and talked to you from the Doctrine and Covenants; is that right?

A. No; I said the Book of Mormon.

Q. Well, but you just now said they taught the Doctrine and Covenants?

A. Oh, yes sir.

Q. That is right. I show you what is called the Doctrine and Covenants, published by the Church of Jesus Christ of Latter-day Saints, Salt Lake City, Utah. And this book is dated 1943. Is that right?

A. That is what it says.

Q. That is what it says. I want to read one or two verses of this and ask you—by the way, to your knowledge how long [fol. 30] has this been published and available to the public?

A. I wouldn't know.

Q. Ever since you were a little child?

A. Oh yes.

Q. In fact, you can remember it when you were a little girl?

A. Yes sir.

Q. At home?

A. Yes sir.

Q. And you have seen it, off and on, ever since?

A. Yes sir.

Q. All right. This is dated 1943, this one. Let me turn to Section 133. I want to read one verse from that, and you might see if I am reading correctly. I mean 131. Now, follow me, will you.

"In the Celestial Glory there are three heavens or degrees;

"And in order to obtain the highest, a man must enter into this order of the priesthood meaning the new and everlasting covenant of marriage;

"And if he does not, he cannot obtain it."

Did they teach you that?

A. Yes sir.

Mr. Roberts: "They," I am wondering.

Mr. Barnes: This group, in these meetings.

Mr. Roberts: These defendants.

Q. They taught you this?

A. It was mostly taught to me by Fred, at home.

Q. Mostly by Fred, at home?

A. Yes.

Q. And Fred read this book, then?

A. Yes sir.

Q. Section 132:

"1. Verily, thus saith the Lord unto you my servant Joseph, that inasmuch as you have inquired of my hand [fol. 31] to know and understand wherein I, the Lord, justified my servants Abraham, Isaac and Jacob, as also Moses, David and Solomon, my servants, as touching the principle and doctrine of their having many wives and concubines—

"Behold, and lo, I am the Lord thy God, and will answer thee as touching this matter.

"Therefore, prepare thy heart to receive and obey the instructions which I am about to give unto you; for all

those who have this law revealed unto them must obey the same.

"For behold, I reveal unto you a new and everlasting covenant; and if ye abide not that covenant, then are ye damned; for no one can reject this covenant and be permitted to enter into my glory.

"For all who will have a blessing as my hands shall abide the law which was appointed for that blessing, and the conditions thereof, as were instituted from before the foundation of the world.

' And as pertaining to the new and everlasting covenant, it was instituted for the fulness of my glory; and he that receiveth a fulness thereof must and shall abide the law, or he shall be damned, saith the Lord God."

Is that what they read to you, Mr. Fred?

A. Yes.

Q. Let us go over here to paragraph 64 of the 132nd Section concerning a wife:

"And again, verily, verily, I say unto you, if any man have a wife, who holds the keys of this power, and he teaches unto her the law of my priesthood, as pertaining unto these things, then shall she believe and administer unto him, or she shall be destroyed, saith the Lord your God; for I will destroy her; for I will magnify my name upon all those who receive and abide in my law."

Did Fred read that to you?

A. Yes sir.

Q. Fred didn't print this book, did he?

A. No sir.

Q. And the book, so far as you know, has been published [fol. 32] ever since you were a girl?

A. Yes sir.

Q. In Salt Lake City?

Mr. Patterson: What was the date of the publication of that book?

Mr. Barnes: 1943.

Mr. Patterson: By whom?

Mr. Roberts: We object to that.

By Mr. Barnes:

Q. I will ask you if this book, on its front page says, "Published by the Church of Jesus Christ of Latter-day Saints,

Salt Lake City, Utah, United States of America, 1943;" is that right?

A. Yes sir.

Mr. Barnes: That is all.

* * * * * * *

HELEN G. SMITH.

Direct examination.

By Mr. Roberts:

Q. Before this time, had you had any discussion with your husband in connection with plural marriage?

A. No.

Mr. Patterson: Object to it, your Honor. Limited by the Statute and the Constitution, the wife testifying against her husband.

Mr. Roberts: She isn't testifying against her husband.

Mr. Patterson: The husband is not on trial?

Mr. Roberts: That is right.

Mr. Barnes: The husband is one of the defendants.

Mr. Roberts: He is in the Armed forces, and the court heretofore entered an order that he and one other defendant——

Mr. Patterson: It has been dismissed?

Mr. Roberts: No, it hasn't been dismissed.

Mr. Barnes: Can't help it. It is the same thing if the court please.

[fol. 33] Mr. Patterson: Whether the husband is on trial or not she can't get up here and deride his character and testify against him.

Mr. Barnes: He may be on trial.

Mr. Roberts: That is his privilege.

Mr. Lowry: It is not the attorney's privilege.

Mr. Barnes: We represent him. I represent him.

Mr. Patterson: She isn't permitted to testify. It isn't a matter of consent. It is against public policy.

Mr. Barnes: I speak for him as his attorney.

The Court: The basis for the rule, gentlemen, is to preserve inviolate confidences between man and wife during marriage relations.

Mr. Roberts: That isn't the privilege they contend for.

The Court: That is the privilege.

Mr. Roberts: The Constitution provides a wife shall not testify against her husband, or a husband against a wife. She is not testifying against her husband. The husband is not on trial.

The Court: He may be on trial.

Mr. Roberts: Some day, but when that time comes he can raise that privilege, and, of course, she will not be permitted to testify against him.

Mr. Barnes: I raise it now, as his attorney.

Mr. Roberts: This testimony can't be used against him, if he claims the privilege.

Mr. Barnes: It will be used against his character.

The Court: Isn't the basis and the reason for the rule, Mr. Roberts, as I stated, and if that is the reason, then isn't it violated if she is permitted to testify here, or what is your view?

Mr. Roberts: My view is it is only a privilege the husband could contend for when he is a party to the lawsuit.

The Court: Well, that is right, but this is certainly a unique situation. I don't suppose it has ever arisen before.

Mr. Roberts: But he is not a party to this suit, at the present time.

Mr. Patterson: The purpose of the Statutes and the Con-
[fol. 34] stitution is to protect the marriage relations, that they may remain inviolate.

The Court: In the beginning of this case the court directed a severance of the trial of these two people. It wasn't a dismissal.

Mr. Lowry: That is right.

The Court: What is the status of these two defendants?

Mr. Lowry: They are not even before this court. Smith isn't. He has never been arraigned in the City Court. He has never been bound over.

Mr. Roberts: There is this, too, in connection with it. He is shown as a conspirator in this case. I think then any act which he does or any declaration he makes which are in furtherance of this conspiracy is admissible against all members of the conspiracy.

The Court: Yes, but that doesn't get you around the privilege, does it, Mr. Roberts?

Mr. Roberts: The thing that eliminates the privilege in this case is the fact he is not on trial.

The Court: He is not a party to this action.

Mr. Roberts: That is right, and this testimony is not against him.

The Court: I certainly want to be right about this.

Mr. Patterson: If her husband were not a defendant at all, never lived the life at all, why she couldn't get up and testify against him.

The Court: The statute says neither the husband nor the wife shall be a competent witness for or against the other in a criminal action or proceeding to which one or both are parties, without the consent of the other. And there are certain exceptions.

Mr. Barnes: If the court please, he is a party to this proceeding.

The Court: I think the expression "proceeding" there is used in the sense "the particular action." I am going to resolve the matter in favor of the State and permit her to testify.

Objection overruled.

Mr. Barnes: Exception.

[fol. 35] HELEN G. SMITH.

Cross-examination.

By Mr. Barnes:

Q. Were you born a member of the Latter-day Saints Church?

A. Yes, I was.

Q. And you have made some mention here of a conversation—no, not a conversation, a statement made by Joseph Musser at this meeting, where I think you stated your sister-in-law had remonstrated with them concerning your husband; is that right?

A. Yes.

Q. You stated part of that statement. You didn't attempt to state it all, did you?

A. I don't know what you mean.

Q. You didn't attempt to give all that Mr. Musser said?

A. Oh no, I didn't tell everything he said.

Q. That is right. Do you know the lady sitting at the end, who is now taking shorthand notes, Myrtle?

A. Myrtle Allred.

Q. Yes. You know who she is?

A. Yes.

Q. Was she there at that time?

A. I don't remember seeing her at that time. She could have been there.

Q. Yes. Generally took shorthand notes of these meetings; is that correct?

A. I didn't ever see her take shorthand notes.

Q. Now, I am going to read this statement to you, purporting to be——

Mr. Roberts: Just a minute. If doesn't purport to be anything and I object to that language.

Mr. Barnes: I will withdraw that.

Q. I am going to read this statement to you, and you indicate to me if it isn't exactly what Mr. Musser said on that occasion, will you do that?

A. How can I remember if it is exactly what he said?

Q. Use your best memory, that is all:

[fol. 36] "I do not wish to say anything that will tend to create feelings of animosity. The Gospel of the Lord Jesus Christ is broad enough and roomy enough for the spirit of peace, good-will, love, charity, and all the attributes of God to dwell in. We have had placed——"

Mr. Roberts: I object to a question so long, your Honor. I think it could be cut up and asked, "Did he say that," instead of going through the whole thing.

Mr. Patterson: Ask her if he said that much of it.

Mr. Barnes: I am asking her to stop me——

A. Yes, that sounds right.

Q. You stop me when it doesn't.

"We have had placed before us today two thoughts and, so far as I know, both have emanated from minds that are pure and desirous of accomplishing good. My only purpose in life is to live the law which the Lord Jesus Christ has given. I care not for man's laws when they conflict with the laws of God. I know there are some among us—many in our own Church (the Church of Jesus Christ of Latter-day Saints)—who hold that the law of the land, the law of man, must be observed

in preference to the law of God, when the two conflict. That theory is held by many of our good people—many of our leading people. In fact the 12th Article of our faith indicates that we believe in being subject to kings, rulers, presidents, etc., in obeying, honoring, and sustaining the laws. By some this Article is placed before and above all the other Articles of Faith, and many of the Saints justify the putting away of principles of life and salvation on the authority of that one Article. Other and companion Articles are forgotten; for instance No. 11—'We claim the privilege of worshipping Almighty God according to the dictates of our own conscience, and allow all men the same privilege, let them worship how, where or what they may.' That expresses our feelings.

"I don't feel that it is just right to come here to pick a young man to pieces as has been attempted today. Suppose this young man has been a little reckless ... his younger days. Perhaps he has not been more so than [fol. 37] I myself. I don't know his former life, but I do believe in the power of repentance and in the forgiving grace of *of* Almighty God. Then, again, when we speak as our sister has done, of a religion that divides families and breaks the hearts of loved ones, I have an idea that this young man's father went to Europe or in some other part of the Lord's vineyard to labor as an ambassador of Christ, and that he then taught the same Gospel that we are preaching here today and which separated families—separated husbands from wives and wives from husbands and children from parents as a consequence of some embracing the unpopular doctrines of Mormonism.

"I am speaking only in general terms. I taught the Gospel of the Lord Jesus Christ in the South, and when a certain man received it and was baptized his wife wanted nothing more to do with him. I remember reading in history that when Heber C. Kimball came West with the Mormon pioneers, one of his wives, wanting nothing to do with Mormonism, remained in the East. She left him.

"I recall another instance in history—that when Brigham Young advised Joseph F. Smith to enter the order of plural marriage his wife told him she would leave him if he did; and she did leave him because he

took another wife, and another, and another, and another: Why did he do it? Because he had been counseled to do it by the Prophet of God, Why did the Prophet counsel him to do it? Because it is a principle of life and salvation. It was necessary for him to embrace that principle if he wanted the blessings he was after—the blessings of Abraham; if he wanted to go into the presence of Abraham, and finally into the presence of God the Eternal Father.

"To go where God is and become a joint heir with Jesus Christ, one must live the law that God and Christ are living, and President Smith did this as a young man. Yes, a woman's heart was broken. She went to California and, so far as I know, they never met again in life. But they will meet. This is only the beginning of eternity. They will meet again, and if that woman is ever exalted it will be through the Priesthood of God [fol. 38] held by Joseph F. Smith, and I believe with all my heart that she will be exalted.

"I recall a statement ascribed to the Prophet Joseph Smith, when his wife Emma opposed him and sought to hinder him from going on with some work he had been appointed to accomplish. He said he loved Emma and he would have her even though he might have to go into hell to save her. That sounds rather harsh to modern ears, I know, but hell simply means the state that isn't heaven; and a woman who destroys, or tries to destroy the Priesthood of her husband and rebels against him when he is faithful to the laws of God, will have to go into that state and be redeemed before she can be exalted.

"These are facts. We cannot change them. We haven't a spirit of animosity toward any person in this house today. I believe I am as free from hatred as a man can be under the circumstances. I love this young man who has been mentioned and severely chided by his sister. I love his testimony; it was an honest testimony. I didn't proselyte him—Brother Barlow didn't proselyte him to the belief he now entertains. He caught the light and came in among this group of Saints through the promptings of the Spirit of the Lord. We are not an organized group. It is a group of people that meet occasionally in prayer and supplication and

the exchange of ideas in order that they might get nearer to the Lord and have a better understanding of the principles of life and salvation. There is only one Church in the world approved of the Lord, and that is the Church of Jesus Christ of Latter-day Saints—the Church we adhere to in our faith; but since some of us are not welcome in the various church houses, we meet here and in other places until such time as the Lord returns order to His house as He has promised to do (D. & C. Sec. 85).

"We know, the Church knows, the leaders know and some of them have confessed in my hearing that the Church is out of order; that it is not living up to the high ideals and principles of life and salvation that Joseph revealed and established under the direction of the Lord. We all know that. We all know that the Church has been driven into the wilderness. Why? Because [fol. 39] the people have apostatized—ceased living the high and holy principles revealed to us through the Prophet Joseph Smith. What are these principles? One of them is the law of Gathering. We abandoned that law years ago, and as a result we have saints all over the world fighting and seeking to kill each other, and this because we wouldn't let them gather to Zion.

"There is the law of the United Order which the Saints left, and cannot live today because of selfishness; but we have got to live it before we can accomplish the mission resting upon us.

"Then the law of Celestial marriage that gives me, if I am faithful, the right to have my children and wives throughout eternity. We gave it up for statehood and to become as other people. We did it voluntarily. Our leaders sent a petition to the President of the United States, stating that in order to be in harmony with our own fellow citizens, we would voluntarily give up this principle that we had always taught was necessary to a complete salvation and exaltation.

"Well, this little group of people are not converted to that serfdom. We believe in following our leaders insofar as they follow the revelations of the Lord and we have a right to that belief. We have our agency. Before we ever came in the flesh the war in heaven was predicated on this principle of agency. Lucifer said, 'I will save them all; I will force them to do right, I will

take their agency from them and none will be lost, but give me your honor'. The Lord Jesus said, 'Father, Thy will be done. I will go down and give my life; I will redeem the human family from the consequences of the fall, and they will still retain their agency to individually work out their salvation'.

"It is a question of agency. These people here today are exercising their agency in being here. I am exercising my agency in talking to you, and if I say anything that is not correct your agency gives you the right to reject it—it is me and not you to blame. I am exercising that agency which we came into mortal life with and are privileged to sustain and support.

"This young man is a man of God, if my impressions [fol. 40] are correct. Why do I know it? Because he has the spirit of the Lord with him. I have talked with him on many occasions, and he has manifested the Spirit of the Lord. I am not mixed up in his family affairs. I know his mother feels very badly; we have seen it. One of the sisters here said, 'Christ came not with peace but with a sword.' Why a sword? The sword of truth to separate the wicked from the righteous. That is what God's law does. Christ was full of humility, love, kindness, and charity, but the doctrine which he brought with him (and it was the doctrine of the Gods) was what formed the sword that destroys the wicked and brings to naught those that are trying to destroy the lives of good men and women.

"We are at war; we have always been at war. There has been a war ever since the days of Father Adam. You, brothers and sisters, are soldiers of this war; you have enlisted in the conflict to combat error, and it is your duty—it is the duty of every man and woman to stand for right and righteousness; fight for the right of agency.

"There are no more free women in the world than Latter-day Saints women. I have heard the charge time and again how Mormon women were enslaved and ruled over by their brutal husbands. I used to smile at some of the people of the Southern states when on a mission among them—to see women go into the fields and work by the side of their husbands, and at noon while the men folks were napping the women would nurse their babies, get dinner, and then return to the

fields with the men; and some of them in their ignorance would talk about our women in the West being slaves. There never was a freer set of women in the world than those of the Latter-day Saints. They don't have to accept plural marriage. Every normal woman has a right to a husband.

"Collier's Weekly, a couple of weeks ago, published an article showing that now one woman in seven has no chance under the monogamic system to marry; and as a consequence of the present war the article predicts there will be millions of women who cannot obtain husbands. Who has a right to say these surplus women cannot marry and become mothers? Who has that right? Man hasn't; the government hasn't. It is an [fol. 41] inherent right and only God can stop it.

"Here in this congregation is a woman who came 8000 miles to claim that right, and who is there among mortals that can deny her that privilege. Who has the right to deny my daughter the privilege of marrying, if the opportunity presents, though it means honorable plural marriage?

"I recall a prophecy accredited to the late President Joseph F. Smith to the effect that when outsiders and the people in the Church fight the principle of plural marriage, then the more need to obey it. 'I further predict,' he said, 'that the United States will yet practice that principle; not because we do, but because of necessity.'

"These are very serious facts, my brothers and sisters—facts that we have got to meet and acknowledge. Talk about immorality, plenty of it exists among our people in this city. President Heber C. Kimball once predicted that if we gave this principle of plural marriage up (which we have done) our daughters would walk the street as common harlots and the parents could not help themselves. This is being fulfilled at the present time. The town and state is filled with soldiers, many of them loose, corrupt and diseased, and they are associating with the fair daughters of Zion and corrupting them, while we try to stay the yearning hearts of these fair daughters that are reaching out for motherhood we say they must not marry because there are too many of them; they may entertain the stranger but must

not entertain plural marriage even though all the parties involved are agreeable to the arrangement."

Mr. Roberts: I think there should be some limitation. I have sat here quite a while listening to this, but it seems to me he should at least give the witness an opportunity to be heard as to whether or not this was said. Then the thing of reading this entire talk in this manner—if there is something of importance which he wants out of it, let him read that, and ask if that was not said, instead of this entire thing. And I object to it on the grounds of its length and on the ground that only those parts that are material should be pointed out here. I don't think this witness could [fol. 42] say that was correct. She could say that was, in a general way. I suggest at this time counsel permit the witness to answer the question after each statement or two has been said.

Mr. Barnes: I have asked her, under oath, to indicate the second that I was stating something that didn't occur.

A. He could say some little word in there and I wouldn't know. It has been so long.

By Mr. Barnes:

Q. I am asking you if there is anything that strikes you as not having been said at that time?

A. I think all this was said, yes.

Mr. Barnes: She says, "I think all this was said."

A. I remember hearing this, yes.

Mr. Barnes: I am nearly through with this, and the next paragraph is very important.

The Court: Go ahead.

Mr. Barnes: The reason I am reading it all is because I wanted to read the parts that might be construed unfavorable as well as that which I regarded as otherwise.

"I have had leading Gentiles tell me that if the government would leave the Mormons alone for fifty years and let them practice their system of marriage they would be the greatest people upon the face of the earth, mentally, physically and spiritually. Now, a principle that would bring that result is not a bad principle. This group is not all engaged in the practice of plural mar-

riage, and we are not urging them to enter the system, but those who want to go back into the presence of Father and qualify as Gods will have to live the law that Father is living—and one of those laws is plural marriage in the celestial order."

Q. I think you have answered you recall that being stated upon that occasion; is that correct?

A. Yes.

Mr. Barnes: That is all.

Mr. Roberts: That is all.

[fol. 43] In District Court of Salt Lake County

Verdict

We, the jurors impaneled in the above case, find the following named defendants:

All of the 31 defendants named above guilty as charged in the information.

Dated Oct. 6, 1944.

(Signed) David T. McNeil, Foreman.

[fol. 44] In District Court of Salt Lake County

Notice of Motion for New Trial and Form of Motion—

Filed October 10, 1944

To The State of Utah and to Brigham E. Roberts, District Attorney, Third Judicial District of the State of Utah;

Please take notice that the defendants other than the defendant LeBaron will move the above entitled court that it grant to said defendants each, severally and jointly a new trial in the above entitled action at the hour of 2 o'clock P. M. on Friday the 10th day of November, 1944, and that a copy of such motion to be made is as follows:

Motion for New Trial

Come now the defendants in the above entitled action other than the defendant LeBaron by their counsel herein

and jointly and each for themselves severally respectfully move the above entitled court as follows:

That a new trial be granted to them and to each of them severally in the above entitled action.

For ground for said motion the defendants, and each of them severally, rely upon the files and records herein, the minutes of the above entitled court, the laws of the State of Utah, the Constitution of the State of Utah, the Constitution of the United States and the Treaty of Guadalupe Hidalgo, and the following averments, to-wit:

1. The jury received out of court evidence other than that which might result from a view of the premises, or some communication, document or paper referring to the cause.

2. The jury was guilty of misconduct by which a fair and due consideration of the cause was prevented.

3. The verdict returned by the jury was determined by lot or other means than a fair expression of an opinion on the part of all of the jurors.

[fol. 45] 4. That the court has misdirected the jury in matters of law.

5. That the court erred in deciding questions of law arising during the course of the trial.

6. That the court allowed the District Attorney and the Assistant District Attorney in their arguments to the jury to dwell upon and argue matters of purported evidence which were not before the jury for its consideration, over the objections of defendants timely made, in prejudice to the substantial rights of the defendants and each of them.

7. That the court submitted the question of the guilt of each of the defendants when a number of them were not in any wise shown by the evidence to have done any act or thing relating to the crime charged, to the prejudice of the substantial rights of all, and each of the defendants.

8. That the verdict is contrary to law.

9. That the verdict is contrary to and not supported by the evidence.

10. That new evidence has been discovered material to the defendants and each of them, and which they could not by

the exercise of reasonable diligence have discovered and produced at the trial. This motion will be supported by evidence to be filed in the time required by law.

Respectfully submitted, Joseph H. McKnight, Knox Patterson, Claude T. Barnes, Attorneys for Defendants Other Than the Defendant LeBaron. By (Signed) Claude T. Barnes. Edwin D. Hatch of Counsel for Defendants Other Than the Defendant LeBaron.

[fol. 46] You will please govern yourselves accordingly.

Dated this 10th day of October, 1944.

Joseph H. McKnight, Knox Patterson, Claude T. Barnes, Attorneys for Defendants Other Than the Defendant LeBaron. (By (Signed) Claude T. Barnes. Edwin D. Hatch of Counsel for Defendants Other Than the Defendant LeBaron.

Received copy of the foregoing Notice and Form of Motion for New Trial this 10th day of October, 1944.

Brigham E. Roberts, District Attorney for the Third Judicial District for the State of Utah, by (Signed) Howard F. Coray, Deputy County Attorney.

[File endorsement omitted.]

[fol. 47] In District Court of Salt Lake County

Motion for Judgment of Not Guilty Non Obstante Veredicto—Filed October 30, 1944

Comes now Joseph White Musser, one of the defendants, and moves the Court for judgment of not guilty in favor of said defendant notwithstanding the verdict. Said motion is based on the fact that the evidence as shown by the transcript thereof is insufficient to prove the commission by this defendant of the crime charged.

(Signed) Claude T. Barnes, J. H. McKnight, Knox Patterson, Attorneys for said Defendant. (Signed) Ed. D. Hatch, of Counsel.

Received copy this 30 day of October, 1944.

(Signed) Brigham E. Roberts, District Attorney.

[fol. 48] IN DISTRICT COURT OF SALT LAKE COUNTY

JUDGMENT

November 10, 1944.

Defendants' motion for a new trial comes now on for hearing, defendant Ross Wesley LeBaron being present in person and being represented by Ray McCarty as counsel, and all other defendants being present in person and being represented by J. H. McKnight and Knox Patterson as counsel, and Brigham E. Roberts, District Attorney, and H. D. Lowry, Assistant District Attorney, appearing in behalf of the State of Utah.

Comes now Ray McCarty and submits the motion of defendant Ross Wesley LeBaron for a new trial without argument. Comes now Conrad Wittenberg and asks and is permitted to withdraw as bondsman for said defendant Ross Wesley LeBaron, and said bondsman is released from all further obligations in the within case. Whereupon the motion for a new trial by all remaining defendants is argued to the Court by respective counsel, and documentary proof (Exhibit "AA", letter of Mark Peterson) is offered by said defendants and received, and said motion is submitted, and the Court being fully advised in the premises, it is ordered that said motion is denied as to all defendants.

It is further ordered that defendants' motions for judgment of not guilty, Non Obstante Veredicto, are also denied. Whereupon this being the time heretofore fixed for the passing of sentence upon the above named defendants, and the defendants having answered that they, and each of them, have no legal cause why sentence should not be pronounced at this time, the Court now pronounces the following judgment and sentence:

"It is the judgment and sentence of this Court that you, Joseph White Musser, John Yates Barlow, Louis Alba Kelsch, Heber Kimball Cleveland, Charles Frederick Zitting, Dr. Ruland Clark Allred, Albert Edmund Barlow, Ruland Timpson Jeffs, George Hemicke Kalmar, Ross Wesley LeBaron, Guy H. Musser, Robert Leslie Shrewsbury Alma Adelbert Timpson, Zola Chatwin Cleveland, Marie Beth Barlow Cleveland, Rhea Allred Kunz, Myrtle Lloyd, Ruth Barlow, Melba Finlayson, Mable Finlayson, Mary Mills, Leona Jeffs,

Juanite Barlow, Jean Barlow Darger, John (Hans) [fols. 49-50] Gerhardt Butchereit, Jonathan Marion Hammon, Ianthius Winford Barlow, Joseph Lyman Jessup, David Brigham Darger, Morris Quincy Kunz, and Edmund F. Barlow, and each of you, be confined and imprisoned in the Salt Lake County Jail for a term of one (1) year."

It is further ordered that stay of execution of sentence for all defendants other than Ross Wesley LeBaron be granted to and including November 17, 1944, pending the filing of appeal bonds, said bonds to be of the same amounts as the bonds now in force. It is further ordered that a commitment issue forthwith for defendant Ross Wesley LeBaron for the reason that bondsman for said defendant LeBaron has withdrawn.

[fol. 51] IN SUPREME COURT OF UTAH

APPELLANTS' ASSIGNMENTS OF ERROR

1

The Court erred in its refusal to give Defendants' Requested Instructions Nos. 1, 2, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 22, 23, 25, 26, 28, 29, 30, 31, 33, 34, 38, 40.

9

In not giving the substance of defendants' requested Instruction No. XXIV, as to the effect of a discussion being one of religion and religious principle, and so disregarding the fundamental rights of defendants under the First Amendment to the Constitution of the United States of America.

11

In its failure to give to the jury, either verbatim or in substance, defendants' requested Instruction No. 36; thereby denying to defendants, and each of them, their fundamental rights under the 1st, 6th, 8th and 14th Amendments to the United States Constitution.

14

In its refusal to give to the jury any part of the substance contained in defendants' requested Instruction No. 42, so

denying to defendants their fundamental rights under the 1st and 14th Amendments of the Constitution of the United States of America.

15

The Trial Court erred in excluding from all consideration by the jury, and in failing to instruct thereon, the religious belief and doctrine of the defendants, so denying to them their fundamental constitutional rights under the 1st and 14th Amendments to the Constitution of the United States, as to religious matters, and further so denying to defendants, and each of them, due process of law.

[fol. 52]

18

The Court erred in giving Instruction No. 1, in this:

It is so incomplete as to amount to a mis-statement of the law, until the Court further instructed that such acts, if proved, were not in or of themselves any transgression of law, or any evidence of any conspiracy, unless shown to have been done in furtherance of the carrying out of a conspiracy inimical to public morals. Such is particularly true in the light of the contents of the Court's Instruction No. 4, said last being not contained in Instruction No. 1, or inferable therefrom. So, defendants have been deprived of the due process of law as guaranteed by the Federal Constitution.

20

The Court erred in its Instruction numbered 4, generally and particularly, and particularly in the last paragraph thereof, in that the Court therein declared that the practice of a religious tenet, when proscribed by the civil law is, in fact, an immorality, and injurious to public morals—a determination beyond the power of any Court to make. The law cannot declare upon such matters, the proscription of the Federal Constitution precluding either the Legislative or the Judicial or the Executive branch of the government of any State, or the Nation, from the exercise of such power; hence any instruction, that such acts were "a matter of law", amounts to an instruction upon the same "as a matter of fact", and is beyond the powers of any Court. The defendants were thereby denied due process of law.

21

The Court erred in Instruction No. 5 in this: It included in the overt acts the charged "attempt" to convert Helen Smith. It nowhere appears that such attempt so much as slightly influenced Helen Smith in the premises; that she at no time contemplated any compliance with the religious tenet, but, on the contrary, denied and fought it openly. Under the law of "attempt", no such is here shown, and such inclusion of the same was error in law. The defendants were thereby denied due process of law. Such seems to have been recognized by the trial Court as is evidenced [fol. 53] by the final paragraph of said instruction.

This error, in combination with the same inclusion in Instruction No. 1, placed undue emphasis upon a matter erroneously instructed upon, and erroneously included as aforesaid, so misleading the jury, to the prejudice of every defendant, and to the denial of due process of law to each.

25

The Court erred in giving Instruction No. 9 in this: It failed to instruct that any specific law of Utah had application to the charge here; failed to instruct that no violation of any law of Utah is shown by any acts which might be included in, and not exceeding those matters stated in its first paragraph; that something further than that must appear.

Said instruction is so general as to leave to the jury the determination of what, if any, law of Utah the defendants might have been held to have violated. Thereby each defendant has been denied due process of law.

30

The Court erred in its statement to the jury, at the very outset of the proceedings as follows:

"I want to say to you at this time, that the mere fact that you have read about this case in the newspapers, or that you have discussed it with others, or heard it discussed by others, or *that you have formed or expressed an opinion* based solely upon newspaper accounts of the case, or gossip or common notoriety, those things in and by themselves *do not disqualify you from serving as jurors on this case, if you can, in spite of that,* and nevertheless *be*

fair and impartial, put to one side any opinion that you may have formed, based upon the sources that I have indicated." (Italics inserted.) This ignored a deep seated bias created by a religious conflict.

No juror, having such position, could possibly be a disinterested or impartial juror, hence was disqualified for favor if not for actual bias. (See: Reynolds v. U. S., 96 U. S. 246; U. S. v. Miles, 103 U. S. 304, and numerous other cases so holding.) *No juror, having such necessity to for-* [fol. 54] *get, could begin with a presumption of innocence.* Thereby the Court denied to defendants due process of law and a fair trial by impartial jurors, in violation of their Constitutional rights, under Constitutions of Utah and of the United States, and the 1st and 14th Amendments to said United States Constitution.

34

The Court erred in its statement of his test of opinion that might be held and that would disqualify a juror as follows:

". . ., I want to know now if that opinion is a conviction of such fixity in your mind *that it would not yield* to the evidence produced in this courtroom?" and thereby conveyed to all other prospective jurors that such an *opinion as "would not yield" to evidence of innocence* was the sort of opinion which, alone, would disqualify a juror, so implanting erroneous concepts in the minds of other jurors, and so, in effect, stating that a burden rested upon each defendant to prove his innocence, and so remove such opinion.

Thereby all jurors under examination were erroneously instructed and such necessarily entered into the form and type of response to all after-questions upon the subject of possible opinion held by them, and so affected their concept of the requirements of law as to preclude their proper answer to such questions. Thereby the Court denied to defendants due process of law, and their Constitutional rights thereto.

36

The Court erred in its contradiction of the law of challenge of juror for cause in criminal cases as stated by J. H. McKnight, Esq., and so denied to defendants due process of law.

37

The Court, in its examination of jurors for opinion held, failed to accord to the defendants their Constitutional rights to have jurors sit for trial of the case whose prior opinions were not such as would require evidence to change the same, and so denied to defendants their Constitutional [fol. 55] rights to fair and impartial trial before fair and impartial jurors, and so due process of law.

38

The Court erred in its question addressed to the juror, Mr. Decker, as follows:—"Is it such an opinion that it would not yield to the facts presented here in the court room before you for your consideration, as a juror?" in that the same is a mis-statement of the law and implied a necessity for a showing of innocence on the part of the defendants at the outset of any trial, and a continuance of such proof by the defendants, so by clear import, fixing in the minds of other jurors such as the test of opinion as a disqualifying element, and denying to defendants due process of law.

74

Court's statement of the "condition" of connecting the husband of Helen G. Smith as co-conspirator, after elimination of him as such at the beginning, as the assigned basis *relied on by the Court for the admission of his wife's testimony* in the case, and then the continuance of her examination. And the subsequent admission of any of her testimony.

Thereby the said Heber G. Smith, to all intents and for all purposes, was made to be considered by the jury as a defendant on trial, as a co-conspirator, and so allowing his personal persuasions of his wife to be carried over as against all defendants then actually and lawfully on trial.

Thereby the Constitutional provision that such could not occur *except on the express consent of Smith* (and no such even being seemingly present) was violently disregarded, to the irreparable injury of each defendant, and the testimony of this witness was most convincing to the jury, without any possible doubt. Thereby due process of law was not accorded.

177

Ruling, denying new trial.

[fol. 56] 178

Ruling denying "motion *non obstante veredicto*". Denied due process, violated 1st and 14th Amendments.

179

Sentence passed, ignoring objection, as to time. Denied due process, and in clear violation of the statute.

180

Denial of Demand for Bill of Particulars.

181

Denial of Motion to Quash. (Sept. 5, 1944.)

182

Denial of Motion to Dismiss as to all the Defendants. (October 2, 1944.)

183

Denial of Motion to Dismiss as to fourteen defendants. (October 2, 1944.)

184

Denial of Motion to Dismiss as to individual defendants.

185

Denial of Motion for Declaration of Mistrial (Oct. 2, 1944.)

186

Denial of Motion of Mistrial. (October 6, 1944.)

[fol. 57] IN THE SUPREME COURT OF THE STATE OF UTAH

No. 6816

THE STATE OF UTAH, Plaintiff and Respondent,

v.

JOSEPH WHITE MUSSER, JOHN YATES BARLOW, LOUIS ALBA KELSCH, Heber Kimball Cleveland, Charles Frederick Zitting, Dr. Ruland Clark Allred, Albert Edmund Barlow, Duane Marvell Gee, Ruland Timpson Jeffs, George Hemicke Kalmar, Ross Wesley LeBaron, Guy H. Musser, Robert Leslie Shrewsbury, Heber Chase Smith, Jr., Alma Adelbert Timpson, Zola Chatwin Cleveland, Marie Beth Barlow Cleveland, Rhea Allred Kunz, Myrtle Lloyd, Ruth Barlow, Melba Finlayson, Mable Finlayson, Mary Milis, Leona Jeffs, Juanita Barlow, Jean Barlow Darger, John (Hans) Gerhardt Butchereit, Jonathan Marion Hammon, Ianthius Winford Barlow, Joseph Lyman Jessup, David Brigham Darger, Morris Quincy Kunz, Edmund F. Barlow, Oswald Brainich, Defendants and Appellants

OPINION

McDONOUGH, *Justice:*

By information 33 persons were accused of criminal conspiracy to commit acts injurious to public morals in violation of Sec. 103-11-1 (5), U. C. A. 1943. The information in substance charges that between June 1, 1935, and March 1, 1944, in Salt Lake County, State of Utah, the defendants wilfully and unlawfully agreed, combined, conspired and confederated among themselves and with other persons unknown to the district attorney,

> "to advocate, promote, encourage, urge, teach, counsel, advise *and* practice polygamous or plural marriages and to advocate, promote, encourage, urge, counsel, advise *and* practice the cohabiting of one male person with more than one woman and in furtherance and pursuance of said conspiracy and to effect the object thereof, did commit the following acts:"

(1) That from June 1, 1935, to March 1, 1944, in Salt Lake County, State of Utah, defendants published and distributed once each month, a pamphlet called "Truth"; (2) that on

July 1, 1942, defendants purchased a house at 2157 Lincoln Street in Salt Lake City; and (3) that in 1942 and 1943 in Salt Lake County the defendants attempted to convert Helen Smith to believe in and to live in polygamy. Other overt acts alleged, were not submitted to the jury for consideration.

[fol. 58] Defendants moved to quash the information on two grounds only: (a) That it does not charge the commission of any public offense; and (b) that it states matters amounting to legal justification. Independent of any interpretation by counsel, the information suggests that defendants as a group agreed to practice polygamy, a felony. Since an agreement between one man and a plural number of women to practice polygamy, followed by the overt act of polygamous marriage of the persons so agreeing, would constitute the substantive offense of polygamy by the man, a serious question might arise as to whether such an agreement would charge conspiracy. Defendants did not move to quash on the ground that the information is ambiguous, uncertain, or that it charged more than one offense.

If "the" appeared in lieu of "and" in the two places italicized, and "of" appeared after the word "practice" in each instance, the information would read the way the State apparently construes it. From the argument of defendants in assailing the information for failure to state a public offense, it would appear that in spite of the awkward and ambiguous sentence structure appellants have apparently adopted the construction urged by the State, that the information attempts to charge a conspiracy to commit acts injurious to public morals, by an agreement entered into between defendants to advocate, teach, counsel, advise, encourage and urge other persons to engage in the practice of polygamy and the cohabitation of a man with more than one woman.

Since the alleged conspiracy relates to acts injurious to public morals, the primary question to be determined in testing the sufficiency of the information is, Does the advocacy of the practice of polygamy and the urging of other people to engage in such practices within the State of Utah, constitute *acts* injurious to public morals within the meaning of the conspiracy statute? At the oral argument counsel for appellants contended that *advocating* the practice of polygamy is merely the expression of an opinion or belief; that

such teachings do not constitute *acts;* that such advocacy consequently could not constitute acts injurious to public morals; and that such expressions of opinion and belief are immune from prosecution under the constitutional guarantees of religious liberty and freedom of speech, and could not properly be the subject of criminal conspiracy. They further contend that in a recent case in the United States district court involving a number of the defendants in this case, (United States v. Barlow, et al., 56 F. Supp. 795), it was held that advocating the practice of polygamy as a religious belief, does not tend to deprave public morals. They also claim that by reason of the fact that the appeal by the [fol. 59] government was dismissed by order of the United States Supreme Court, (323 U. S. 805, 65 S. Ct. 25), such decision on such a question became final and conclusive, and is binding on the courts of this state.

In that case some of the defendants here were indicted for conspiracy to violate 18 U. S. C. A. Sec. 334 as amended, which forbids mailing of "obscene, lewd, or lascivious" books, pamphlets, pictures, "or other publication of an indecent character." The defendants were alleged to have published and circulated "Truth" magazine, the publication and distribution of which are charged as overt acts in this case. U. S. v. Barlow, supra, was dismissed, because in the opinion of the Federal judge the excerpts from said magazine charged in the indictment as nonmailable matters under the Federal statute, were not calculated to "corrupt and debauch the minds and morals" of those into whose hands such publications might come. The opinion relates to the interpretation of the Federal statute, and states that the indictment does not charge an offense against the United States. The opinion does state that editorials in such magazines advocate the practice of polygamy, but while stating that such publication is not subject to prosecution under federal statutes, the language recognizes that the act in question might well be subject to prosecution under the laws of Utah:

> "The constitution of Utah prohibits polygamous or plural marriages. It might well be said that any prosecution for violations thereof under our theory of government is a purely local matter for the State rather than the Federal Government, in the absence of a widespread violation of the law."

Absent any constitutional limitation on the power of a state to legislate an adjudication by a Federal court that a specified act does not contravene a Federal statute does not even warrant an inference that such conduct would not violate a state statute. Appellants' contention to the contrary is without merit.

Article III of our State constitution prohibits plural or polygamous marriages. Statutes enacted pursuant thereto, Secs. 103-51-1 and 2, U. C. A. 1943, makes felonious both the practice of polygamy and cohabitation of a man with more than one woman. Such relations are regarded by the law as meretricious. Conduct which induces people to enter into such felonious meretricious relationships, is certainly conduct injurious to public morals. Defendants, however, contend that if a conspiracy could be charged for expression of beliefs and ideas, then every effort to change some obnoxious law or some objectional constitutional provision could be thwarted by a conspiracy charge. There is a vast distinction between advocating a change in the law [fol. 60] by appropriate legislation, and urging people to commit acts in violation of the law. Advocating violation of law is not an equivalent of urging repeal of the law.

Admittedly, a person cannot properly be prosecuted for expressing opinions nor for mere beliefs and personal convictions, however peculiar or repugnant they might seem to others. However, conduct condemned by statute may not "be made a religious rite and by the zeal of the practicioners swept into the First (or Fourteenth) Amendment." Murdock v. Pennsylvania, 319 U. S. 105, 63 S. Ct. 870, 87 L. Ed. 1292. State v. Barlow, et al., 107 Utah 292, 153 P. 2d 647.

Statutes do not attempt to regulate beliefs, but conduct. Freedom of speech and of religion are not unlimited licenses to do unlawful acts under the labels of constitutional privilege. Expressions and the use of words may constitute verbal acts. Words may ignite an inferno of mob violence. As stated by Mr. Justice Holmes in Schenck v. United States, 249 U. S. 47, 39 S. Ct. 247, 63 L. Ed. 470: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force." See also Gitlow v. New York, 268 U. S. 652, 45 S. Ct. 625,

69 L. Ed. 1138, wherein the court said: "That a State in the exercise of its police power may punish those who abuse this freedom by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace, is not open to question." In Davis v. Beason, 133 U. S. 333, 33 L. Ed. 673, 10 S. Ct. 299, wherein petitioners had been convicted of a conspiracy to obstruct the due administration of the laws of Idaho, the Supreme Court in upholding the judgment said: "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. * * * If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counseling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases."

We therefore hold that an agreement to advocate, teach, counsel, advise and urge other persons to practice polygamy and unlawful cohabitation, is an agreement to commit *acts* injurious to public morals within the scope of the conspiracy statute.

[fol. 61] Other than agreements to commit certain felonies which require no overt acts, an unlawful agreement as defined in Sec. 103-11-1, U. C. A. 1943, does not amount to a conspiracy according to the specifications of Sec. 103-11-3, "unless some act, besides such agreement, is done to effect the object thereof by one or more of the parties to the agreement." Thus, a criminal conspiracy essentially consists of an unlawful agreement plus some overt act or acts done to further or to accomplish the object of such an agreement. Defense counsel claim that the information does not show that any alleged overt act was either unlawful or effective. An act done in furtherance of an agreement need not succeed in accomplishing its objective in order to fulfill the requirements of the statute. Thus, the failure to allege that the attempts to convert Helen Smith to believe in and to live in polygamy were successful, would not render the information deficient.

Appellants urge that the right to purchase property is a constitutional privilege, whether for purpose of having a place of worship, a home, for social gatherings or other uses in the pursuit of happiness, and that such purchase

could not be an overt act. The argument seems to miss the point. An act need not be unlawful to be an overt act. It must necessarily be an act which is done in furtherance of the object of the unlawful agreement. State v. Erwin, et al., 10 1 Utah 365, 120 P. 2d 285. The purchase of a gun ordinarily is a lawful act; yet, if there is an agreement to commit murder (which is a criminal conspiracy without any overt act), the purchase of a gun by one of the conspirators for the purpose of carrying out the homicidal agreement would be an overt act. The procurement of any tool, device or instrumentality by one who has entered into the unlawful agreement, which constitutes a step toward the accomplishment of the object of the agreement, is an overt act. There must, of course, be proof that the overt act as alleged was done in furtherance of the unlawful agreement. The information however, need not allege the circumstances which show connection with the unlawful scheme and that such an act was done in furtherance of the unlawful agreement. Such details may be supplied by a bill of particulars.

The three alleged overt acts stated in the information which the court permitted to remain when the case was submitted to the jury, are sufficient statements of overt acts to uphold the information. Whether there was sufficient proof to show that such acts were actually done by the persons alleged and done in furtherance of the alleged unlawful scheme is another question presently to be considered.

[fol. 62] While defendants assign as error the refusal of the court to order the district attorney to furnish a bill of particulars, such assignment of error is not argued, and hence must be deemed to have been abandoned. There are numerous other assignments of error relating to admission and exclusion of evidence wherein appellants compiain that the court erred, without specifying wherein error occurred and without arguing such alleged errors. Of the 186 alleged errors specified, we shall consider those only which are properly specified and which are argued. Those not argued are deemed to have been waived.

Appellants challenge the verdict on the ground that the evidence was insufficient to support a conviction of the defendants as a whole or any of the defendants. They claim error in failure of the court to give their request for directed verdict as to each defendant. It is contended that the State failed to prove that the defendants entered into the agreement alleged. They also argue that there was not sufficient

competent proof to show that each defendant was a party to an unlawful agreement, and that no overt act was satisfactorily proved.

The State had the burden of proving that there was actually a conspiracy, that there was a meeting of the minds between the defendants on the unlawful scheme alleged, and that one or more of such defendants so agreeing committed some overt act or acts in furtherance of the object of such unlawful agreement. The rule of presumption of innocence applies to each individual defendant. The fact that a defendant may be charged as a co-conspirator does not deprive him of any of those safeguards called due process of law, which necessitate that evidence produced against him shall be competent, relevant and material.

An alleged unlawful agreement may be proved by circumstantial evidence insofar as the evidence is competent; but until a defendant is proved by competent evidence to have entered into or to have joined in the alleged unlawful agreement, extrajudicial statements and admissions of co-defendants which tend to implicate him as a party to the agreement or in some overt act, are hearsay and inadmissible as to him. However, when a defendant is shown by competent proof to be a party, then all other persons proved to be parties are his agents for purposes of the unlawful agreement so that acts of such other parties relating to the unlawful agreement or overt acts in furtherance of the agreement are binding upon him under the rules of agency. State v. Erwin, supra. Until a defendant is proved to be a principal, other defendants shown to be parties would not [fol. 63] be his agents, and statements made out of his presence would not be binding upon him regardless of how they might tend to implicate him.

Likewise, where proof of an unlawful agreement is furnished by an accomplice, there must be sufficient corroborative evidence to identify each defendant as a party to the unlawful scheme. If, as to any particular defendant, there is lacking corroborative evidence of that given by an accomplice, the verdict against him cannot stand. Since the transcript shows that evidence introduced to prove that certain defendants were parties to the unlawful agreement or that they later joined in such agreement, was but hearsay, the verdict as to those particular defendants cannot be upheld. As to some defendants identified as parties to the scheme by the testimony of an accomplice, there was no corrobora-

tion by competent evidence, and the verdict as to those defendants likewise must be set aside.

There is some evidence which, standing alone, is just as consistent with innocent conduct as with any theory of unlawful conduct, as such cannot satisfy the requirements of proof. For example, testimony that a certain defendant was seen engaging in conversation with a defendant shown to be a party to the unlawful agreement, without disclosure as to what was said, neither proves that such defendant entered into an agreement nor that if an agreement of some kind was made that it was the unlawful agreement alleged. There were also numerous statements of State's witnesses that a certain defendant "discussed polygamy" without detailing what was said about it. Such generalities have no probative force. The testimony that a defendant "discussed the subject of plural marriage" is not the basis for the slightest inference that anything charged by the State ever occurred. If the witness had testified that a defendant "discussed the subject of crime", no inference could be drawn that he urged someone to commit a crime, nor that he solicited someone to enter into an agreement to commit crime.

There was considerable testimony that some defendants attended meetings at which the subject of polygamy was discussed; that at such meetings some speakers made statements that they had a right to practice polygamy; that the law could not stop them; and that it was the duty of the women to go out and get other wives for their husbands. Mere attendance at meetings is not evidence that the members of the audience entered into any agreement, nor could it imply that the listeners were responsible for what was said at such meetings. The complement of freedom of speech is the right to listen to a speaker's views. Even if a speaker urges violation of the law, no inference can be drawn from [fol. 64] such fact alone that members of the audience entered into an agreement to confederate with such speaker to carry out the design or scheme of such speaker. While coupled with other facts and circumstances, attendance at a meeting where persons proved to be conspirators address a meeting, might forge a chain of circumstantial evidence of an agreement with such conspirators; yet, standing alone, such passive attendance at such meetings would not have sufficient probative value to warrant an inference of unlawful conduct.

Appellants argue that the evidence as a whole merely shows that defendants met for religious purposes; that they conducted ownership, expressed *beliefs* concerning the hereafter; that any person in the congregation was permitted to express his views; and that such meetings and discussions held openly and without barring the general public, were all in the exercise of the constitutional rights of freedom of worship and freedom of speech. Since a conspiracy must necessarily involve some agreement to do something which the parties do not have a right to do, they contend that defendants did only what they had a constitutional right to do, and that consequently no conspiracy could be spelled out from such events.

It is true that *some* evidence introduced by the State would merely show that certain defendants attended such meetings; that some meetings were conducted as religious services; that speakers and class-leaders read from the Bible and other religious works; that tithing was collected, and in part used for relief of persons in economic distress; that at some services topics were discussed such as brotherly love, faith in God, repentance, baptism, patriotism, honesty and rewards after death; that at certain meetings speakers discussed polygamy, reading from the Bible and making the claim that the ancient polygamous marriage system was instituted of God, and that "plural marriage is a law of God," and that some individuals at these meetings declared that legislation prohibiting the practice of polygamy violates the spirit of the First Amendment to the Federal Constitution; that some speakers denounced officials of the Mormon Church for excommunication of people for teaching or practicing plural marriage, stating that the leaders of said church have "no divine authority" and that such church is apostate; and that some services were conducted as "testimonial meetings" at which members of the congregation arose voluntarily to express their views on any subject, and to acknowledge gratitude to God. Counsel for appellants say that this prosecution is nothing more than persecution of appellants for expression of unorthodox views and for membership in an unpopular minority group.

[fol. 65] If it were true that none of the defendants did anything other than to attend meetings as indicated above, expressing disagreement with some other denomination, criticizing legislation, and giving opinions on religious

subjects, none of the convictions could be upheld. The right of free speech cannot be curtailed by indirection through a charge of criminal conspiracy. However, an examination of the entire record discloses that the foregoing statement of evidence does not present the entire picture as to some of the defendants.

We have reviewed the record carefully and conclude that the evidence is sufficient to show an agreement to advocate, counsel, advise and urge the practice of polygamy and unlawful cohabitation by other persons; and that the following named defendants were parties to such unlawful agreement: Joseph White Musser, Guy W. Musser, Charles Frederick Zitting, Heber Kimball Cleveland, Zola Chatwin Cleveland, Jonathan M. Hammon, Ross Wesley LeBaron, John Y. Barlow, Albert Edmund Barlow, Edmund Francis Barlow, Ianthius Barlow, Juanita Barlow, Louis A. Kelsch, Dr. Rulon Clark Allred, David B. Darger, Jean Barlow Darger, Rulon T. Jeffs, George H. Kalmar, Joseph Lyman Jessup, and Alma A. Timpson.

As to the other defendants, there is not, in our opinion, sufficient competent proof, to show that they were parties to the agreement. In some instances, as to defendants against whom the proof is insufficient, there were admissions that they themselves had entered into polygamous relationships; but standing alone, such admissions do not constitute proof that they had entered into an agreement to induce third parties to enter into such practice. Some of the women defendants stated in testimonial meetings that they were "happy with their sister wives" and that they helped each other with the housework. Such statements, standing alone, would not be proof of any unlawful agreement to urge others to practice polygamy. Some statements of some defendants would tend to show that said defendants were victims, rather than principals.

An admission by a person that he had engaged in the commission of some crime or had aided or abetted it in some way, would not be the equivalent of an admission that he had entered into an agreement with someone else to attempt to get others to commit the same kind of crime. Certain evidence tends to show that some defendants associated and communicated with each other because they had violated the law by previously entering into unlawful practices and that they had sought refuge from prosecution.

[fol. 66] There is sufficient competent evidence that the defendants hereinabove specifically named made such statements and did such other acts as to show a meeting of the minds on the unlawful scheme alleged. They used the mechanism of an organization ostensibly and perhaps sincerely designed for religious purposes to commit overt acts in furtherance of their unlawful agreement. Contrary to the arguments of counsel, these particular defendants did not merely express beliefs and limit their remarks to mere academic discussions. It is true that they discussed theological topics at some of their meetings; but they also spoke about polygamy in such a way as to evidence a design to induce others to act and pressure was applied to several people.

Without attempting to detail all of the evidence which shows an agreement such as alleged, we direct attention to certain evidence. Some of the men claimed in public that they had the right to perform polygamous marriages. They proclaimed that polygamy *must* be lived, one defendant saying that the law makes no difference with them. One defendant declared that polygamy should be practiced at present; that public relief "was instituted of the Lord for the polygamy people", and that they should get on relief and stay on relief. One defendant announced that it was the duty of women to find other wives for their husbands. Some also announced in meetings attended by persons not indulging in such practices, that no woman should prevent her husband from taking another wife, and that she should go along with her husband or else step aside so he could take another wife, and that men should have the courage to act. At one of these meetings, one Heber C. Smith, Jr. was made the specific object of remarks of various defendants.

We cite this evidence of acts which tend to prove the agreement itself which shows a systematized plan to induce others to enter into the practice of polygamy, in which scheme of advocacy a number of these defendants participated. Although, as heretofore stated, it is not essential to the existence of a conspiracy that the object of such conspiracy be actuually accomplished, it would appear from the evidence that the efforts to induce Heber C. Smith, Jr. to practice polygamy were actually successful, and that he and his family were among the victims of this conspiracy. There is some evidence that LeBaron with

the aid of his wife, and the arrangements made by Zitting, induced a 13 year old girl to agree to be his polygamous wife. Zitting told her all she would have to do is bear children. While no marriage ceremony was proved, such proof was not necessary. LeBaron stated to the father of this witness that the girl was his wife.

[fol. 67] That this agreement contemplated actual inducements and solicitations directed at others is evident from the testimony of a defense witness. She testified that defendant Hammon stated in one of the meetings that if a man is interested in a girl who is under age and he wants the girl, he should go to the father and first obtain his consent. The witness stated that she understood this to relate to polygamy.

What we have said hereinabove disposes of the argument that none of the defendants did anything except engage harmlessly in the expression of religious beliefs. In fact, some of these defendants wilfully broke up the home of Helen Smith by persistently urging and inducing her husband to enter into the practice of polygamy. The solicitations which induced Heber C. Smith, Jr. to enter polygamy, all in opposition to the interests and desires of his wife, Helen Smith, and the consequent broken home from the divorce which followed, are a complete answer to the contention that none of the defendants said or did anything which could be construed to be injurious to public morals. The claim that everything was on a voluntary basis and that the wishes of others were respected, is unconvincing in view of the unrefuted evidence to the contrary. The contention that all the defendants confined their activities to expressions of beliefs without interfering with the rights of others, and without attempting to induce others to act, is not sustained by the record.

Appellants argue that the alleged overt acts were not proved. It is urged that the publication of "Truth" magazine could not be an overt act in view of the constitutional guarantee of freedom of the press, since only a few editorials could be construed as advocating the practice of polygamy. It is true that the state relied on a few excerpts from said magazine which was published over a period of nine years. A question might arise ordinarily as to whether the publication of a periodical involving numerous issues and extending over a period of years could be considered as one all-embracing overt act. This publi-

cation started in 1935. In order to have been an overt act, the unlawful agreement must have previously come into being, for an overt act is something done in furtherance of the object of the unlawful agreement. The unlawful agreement in this case appears to have been entered into after "Truth" magazine had been published for several years. As to those issues, they could not constitute any overt act. Some of the articles appearing in those magazines were reprints of articles advocating the practice of polygamy, published many years before statehood and prior to enactment of legislation by this state prohibiting such practices. In view of other matters, we are not called upon to decide whether reproduction of those articles amounts to a present advocacy of such a practice.

[fol. 68] Since the State introduced evidence which would tend to show that the house purchased by two of the defendants was used for religious services and for social gatherings, which were admittedly lawful objects, it is urged that such purchase could not be construed as an overt act. People have the right to purchase property for all lawful purposes. The fact that some defendants entered into an unlawful agreement would not necessarily constitute proof that the purchase was made in furtherance of the unlawful scheme. A purchase may be made for more than one purpose, for both a lawful and for an unlawful purpose. There is some evidence that the building was intended to be used in part at least by some of the defendants to advocate the practice of polygamy and unlawful cohabitation. There is also evidence that the house was used as a place of solicitation and to importune people to enter into polygamous relationships. An act done in furtherance of an unlawful agreement is an overt act even if there are additional objectives which happen to be lawful. However, where property is acquired for some purpose which is lawful, evidence that it was also acquired in furtherance of an unlawful scheme must be clear and unequivocal. There is evidence of such a character here.

It is contended that the solicitation of Helen Smith to agree to allow her husband to marry some other girl and to induce her to aid in establishing a polygamous relationship did not constitute an overt act because it was obvious that no amount of persuasion could possibly be effective. Such argument disregards the nature of an overt act. The object of the unlawful scheme was advocating and urg-

ing others to enter into prohibited relationships. Whether such inducements could succeed would not be material. The systematic solicitation, and urging of others to violate the law, went far beyond mere expressions of opinion contemplated by the guarantee of freedom of speech. Words were employed in conversation with Helen Smith with a design to induce her to consent to the proposed meretricious relationship. Pressure was applied to her husband and to her in the endeavor to overcome her antagonism. It is true, of course, that she would not have committed the crime of polygamy by giving her consent; but if she had yielded to the solicitations of certain defendants she would have been required to share her husband with some other woman or women; and because she refused to submit, her home was broken up by reason of the fact that her husband was induced to take a polygamous wife in spite of her objections and refusals.

[fol. 69] Defendants challenged the right of Helen Smith to testify. They claim she was disqualified as a witness because her former husband was named a defendant, although the State severed as to him. Her divorce from Heber C. Smith, Jr. had become final prior to the date of trial so that she was no longer the wife of said Smith. She could not therefore have been testifying against her husband as contended by appellants. See 70 C. J., "Witnesses", p. 125, Sec. 152 and cases cited; and 4 Wigmore on Evidence (2nd Ed) Sec. 2237 at p. 775.

The remaining question relating to her testimony is whether the court committed prejudicial error by overruling objections to questions as to what Heber C. Smith, Jr. said to her at the time he was still her husband. It is claimed in view of the language of Sec. 104-49-3 (1), U. C. A. 1943, any conversation between them during their marital status was privileged and that she could not divulge it. The statute, exclusive of the exception clause, forbids either husband or wife "during the marriage or afterwards" to be examined as to any communication made by one to the other during the marriage without the consent of the other. In In Re Ford's Estate, 70 Utah 456, 261 P. 15, it is stated that the "communication" between husband and wife contemplated by said statute consists of those communications and knowledge imparted which are confidential in character.

In substance, Helen Smith testified that Smith told her at the time she was still his wife, while they were on their way to one of the meetings with some of the defendants, that he thought that Barlow could convince her that she was wrong in opposing plural marriage. Just prior to their going to the Musser home he told her that he would like to have her hear Musser's views on plural marriage and that she would likely feel differently about it. Such remarks related to subjects which were to be and were discussed with third parties. Consequently, they could not be deemed confidential.

Furthermore, the question presented by the assignment of error was not presented to the court below. The only objection interposed below to the testimony of Helen Smith relative to these conversations with Heber C. Smith, Jr. was that it was incompetent, irrelevant, immaterial and hearsay. No objection based on communications between husband and wife was made. An objection to testimony on the ground of privilege is not properly made when based on the ground that it is incompetent. Proffit v. United States, 264 F. 299. Underhill's Criminal Evidence, (4th Ed.) p. 682.

[fol. 70] In connection with the argument that the court committed prejudicial error in excluding defense testimony, we note that counsel for appellants repeatedly asked the following question: "Did anyone at these meetings *urge* people to enter plural marriage?" Objections were repeatedly sustained, although some of the witnesses for the State said in their testimony that certain defendants at these meetings *urged* the practice of polygamy. No harm could have resulted from permitting an answer to the question as worded, although technically the question did call for a conclusion.

Prejudicial error is claimed by reason of certain comments of the trial judge on matters relating to evidence and to defendants. The matter most seriously argued related to contents of a pamphlet exhibited to a witness for the State who was an accomplice. On direct examination she had testified that some of the defendants had discussed polygamy with her and that defendant Cleveland had talked to her and read to her from a certain pamphlet on marriage of which defendant Joseph W. Musser was one of the authors. On cross-examination certain parts of the booklet were read to her and she admitted that they

were some of the portions Cleveland had read to her and she indicated that certain other parts sounded familiar. Later, counsel for defendants attempted to introduce the pamphlet in evidence, and since there had been read into the record the portions alleged to have been read to her, the offer was properly refused. However, in ruling on the offer the following colloquy took place:

> "Mr. Patterson: It seems to me this is material for the reason she testified she was taught from this book, and the best evidence of what she was taught . . .
>
> "The Court: This book is not on trial. Cleveland is on trial.
>
> "Mr. Patterson: She stated she was taught from this book.
>
> "The Court: *There are lots of nefarious books written.* I will exclude that."

The italicized expression was improper, notwithstanding it is undoubtedly categorically correct as a statement of fact. A correct statement of fact may be entirely out of place when made at the improper time or by some person whose duty it is to refrain from making such a remark under the circumstances. A trial judge in a jury trial might be making a correct statement of fact by volunteering that a defendant on trial was tried in his court on some prior occasion and convicted, but the remark would clearly be grounds for a mistrial. The booklet in question here was written by one of the defendants.

The statement without its context and the circumstance which brought it forth would be but an irrelevancy. But when made in response to an argument urging the admissibility of the book and when followed by the statement, "I [fol. 71] exclude that", the jury may well have construed it as a characterization of the publication. Portions of the book has been received in evidence. The court's remark, if construed by the jury as indicated, would constitute a comment on the evidence. In this jurisdiction, such comment is not within the province of the court. State v. Green, 78 Utah 580, 6 P. 2nd 177. And if so understood by the jury, the remark could not be regarded as non-prejudicial. Characterizing as "nefarious" a publication written by a defendant and used by other defendants in what they contended was propagation of religious views,

could not but convey to the minds of the jurors the impression that the court thought that the writer of the book and the propagators of the views therein expressed are iniquitous.

No objection was made nor any exception taken below to this comment. Had there been, and had the implication been called to the court's attention, doubtless the implication would have been erased and any inference therefrom on the part of the jury would have been forefended. Where irregularities are such that a harmful result could not be obviated by any further action, such irregularities may be held ground for reversal, although not excepted to in the trial court. (See People v. Mahoney, 258 P. 607.) But since the indicated implication in the statement of the court was probably not intended, that situation did not present itself. Nevertheless we are constrained to discuss the assignment and to point out its probable prejudicial effect.

Appellants contend that they were denied an impartial jury trial because the judge refused to exclude from the jury panel all members of the Church of Jesus Christ of Latter-day Saints, (for convenience herein called the "Mormon Church"). The judge stated that no one would be excluded from the jury merely by reason of church affiliation. On challenge of some Mormon jurors for alleged bias, on voir dire examination each of them stated that regardless of the emphatic stand of the Morman Church against the advocacy or practice of polygamy, he would try the case according to the evidence and the court's instruction. The charge of bias was not substantiated.

In the effort to impeach said Mormon members of the jury panel for alleged religious prejudice, defense counsel over objection of the prosecution asked such prospective jurors *if they did not know:* (a) That some of the defendants had been excommunicated from said church for advocating or practicing polygamy; (b) That no one is ever excommunicated without a trial at which evidence is produced, and the member charged with disconduct is given an opportunity to defend; and (c) that judgment of excommunication is based [fol. 72] on a finding that the communicant has been guilty of "teaching, preaching or practicing polygamy." Counsel for defendants conveyed to the jurors information that some of the defendants had been found guilty in an ecclesiastical forum of the Mormon Church of either advocating or practicing polygamy. Whatever prejudice might

have been engendered by such defense tactics could not serve as a premise on which to predicate reversible error. Nor could such facts brought into the case by defendants themselves show that individual jurors were biased.

Prejudice is claimed by reason of alleged erroneous questions propounded by the court in the interrogation of jurors, and by reason of certain comments made in relation thereto. The court had a rather exacting job as 89 prospective jurors were examined. Rather early in that process a juror stated that he had formed an opinion as to the guilt or innocence of the defendants, and on further examination stated that "it could be changed" as the case went on; and counsel for defendants subsequently made objection, and in connection with the challenge of a juror for cause, counsel for defendants argued that "if it takes evidence to change that mind he is not eligible. That is the law." To which remark the court responded, "Not in this court, I am sorry to say."

Subsequently, a juror stated that he had formed an opinion as to the merit of the case; that he could not help it, and that his opinion related to the guilt or innocence of defendants. The court then asked: "Is it such an opinion that it would not yield to the facts presented here in the court room before you for your consideration, as a juror?" After objections of counsel the juror answered: "It would take evidence to change my opinion. Does that answer it? I have formed an opinion. I couldn't help it." The court then inquired: "The opinion you now have—could the opinion you now have be removed by the evidence you heard in this court and altered and changed?" He replied: "Yes, sir, by evidence it could." Following considerable argument, the judge said: "Is your opinion (such) . . . that you could lay it aside and consider this case on the evidence presented here, and the instructions of the court, and finally render a fair and impartial verdict based solely upon the evidence produced here in the court room?" The answer was: "By the evidence, yes, sir." The challenge for cause was denied.

A short while later, it appeared that a juror had listened to a discussion of the case. The court asked: "Have you got an opinion now that is of such fixity in your mind that it would not yield to the evidence produced here?" A negative answer was given.

[fol. 73] None of the veniremen whose examination is here discussed served as jurors. They were excused on peremptory challenge. Appellants, however, contend that they were prejudiced by the denial of their aforesaid challenges for cause in view of the fact that they were required to exercise three of their peremptory challenges which might have been interposed to other veniremen who actually served on the jury. Appellants exercised all of their peremptory challenges.

As noted above, the exception taken to the propounded questions of the court was to the effect that if a juror had an opinion which it would take evidence to remove then he could not be an impartial juror since he could not accord to the defendants and each of them the presumption of innocence. Standing alone, the questions set out hereinabove might be construed by the jurors addressed, and the others present who heard the questions, to mean that the jurors might carry with them to the jury room the opinion formed prior to trial and, unless that opinion was changed by the evidence, return a verdict in conformance therewith. It should not be necessary to say that this is, of course, not the law.

However, at the outset of the examination of the jury, the court instructed all of the prospective jurors that those chosen to serve must determine the facts in accordance with the evidence produced in court; that their verdict should be based solely upon that and nothing else. He pointed out specifically that each defendant was clothed with the presumption of innocence and that unless that presumption was overcome by evidence produced in court which proved the guilt of the defendants beyond a reasonable doubt, they were entitled to an acquittal. In such initial discourse to the jury, the following statement by the court was made:

> "The mere fact that you have read about this case in the newspapers or that you have discussed it with others or heard it discussed by others, or that you have formed or expressed an opinion bases solely upon newspaper accounts of the case or gossip or common notoriety, those things in and of themselves do not disqualify you as serving as jurors on the case if you can in spite of that and nevertheless be fair and impartial, put to one side any opinion that you have ever formed based upon the sources that I have indicated."

As to the jurors examined and not excused for cause upon challenge, each had indicated that any opinion that he had formed or expressed was based upon newspaper articles, common notoriety and gossip and that none of them had any direct information with respect to the facts in the case. Of numerous jurors the question was asked as to whether that [fol. 74] juror could lay aside his opinion and consider the case on the evidence presented in court and finally render a fair and impartial verdict based solely upon such evidence. Just prior to the exercise of peremptory challenges, the court again called attention to the presumption of innocence that attended each defendant and asked generally of the panel as to whether there was any one present on the jury who would not be willing to accord each defendant the presumption of innocence until their guilt was proved beyond a reasonable doubt.

In the light of these instructions and comments made by the court subsequest to the answers of jurors in question, we are of the opinion that the jurors could not have been left with the impression that they were qualified to sit as jurors if they entertained an opinion which would require evidence to remove. While the remarks of the court were unfortunate, it appears to us that when the entire picture of events is properly regarded, the effects of the statements complained of were erased from the minds of the jurors. A number of jurors were excused for cause upon challenge, after indicating that they had an opinion relative to the guilt or innocence of the accused which would prevent them from acting impartially in the case.

Section 105-31-21, U. C. A. 1943, provides in part:

". . . but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury founded upon the public rumor, statements in public journals or common notoriety; provided, it appears to the court, upon his declaration under oath or otherwise, that he can and will notwithstanding such opinion act impartially and fairly upon the matters submitted to him."

This provision has been in existence in this state since territorial days and has been construed and applied in numerous cases. See State v. Haworth, 24 Utah 398; People v. Hopt, 4 Utah 247, 9 P. 407, 120 U. S. 430, 7 S. Ct. 614,

30 L. Ed. 708; Thiede v. People, 159 U. S. 510, 40 L. Ed. 237, 16 S. Ct. 62. What we here say should not be construed as in any way departing from the rules therein announced. We are of the opinion that on the whole record, the objections made and exceptions taken, that this assignment of error is not well founded. It is therefore overruled.

In pronouncing sentence, the court announced that the defendants Juanita Barlow and Jean Barlow Darger were under 18 years of age at the time the offense was committed and expressed some doubt as to the jurisdiction of the [fol. 75] court to proceed against those two girls. They were not accused of a felony but an indictable misdemeanor. Sec. 14-7-4, U. C. A. 1943, provides in part:

> "The juvenile court shall have exclusive jurisdiction in all cases relating to the neglect, dependency and delinquency of children who are under eighteen years of age, except in felony cases as hereinafter provided, . . ."

Section 14-7-6, U. C. A. 1943, provides:

> "No child under eighteen years shall be charged with or convicted of a crime in any court except as provided herein. If during the pendency of a criminal or quasi criminal charge against any person in any other court, except felony cases brought before the district courts, it shall be ascertained that said person was under the age of eighteen years at the time of committing the alleged offense, it shall be the duty of such other court to transfer such case immediately, together with a transcript of the proceedings and all the papers, documents and testimony connected therewith, to the juvenile court having jurisdiction. . . ."

As to those two defendants, the case should have been transferred to the juvenile court. While no assignment of error calls our attention to the error committed in trying and sentencing the two named defendants in the district court we take cognizance of that court's want of jurisdiction. The conviction and sentence of Juanita Barlow and Jean Barlow Darger must be set aside.

As to defendants other than the 20 hereinabove specifically named, the judgment is reversed with directions to dismiss as to them. As to the 20 defendants hereinabove specifically named, there is sufficient evidence to support a

judgment of conviction. However, for the reasons hereinabove set out the conviction of Juanita Barlow and Jean Barlow Darger is set aside with instructions to transfer the case as to them to the juvenile court in accordance with the cited statute. The judgment as to the other 18 defendants hereinabove specifically named, against whom the evidence is sufficient, is affirmed.

We concur:

Lester A. Wade, Justice. James H. Wolfe, Justice.

LARSON, *Chief Justice:*

I concur in that part of the opinion upholding the information and declaring that an agreement to counsel, advise and urge other persons to practice polygamy is an agreement within the scope of the conspiracy statute. I concur in the holding that the evidence is insufficient to sustain a verdict against any defendant other than the twenty held by the [fol. 76] prevailing opinion. I agree that as to Juanita Barlow and Jean Barlow Darger the sentence and conviction must be set aside for the reasons stated in the opinion.

Now I note the matters in which I must dissent. I think the questions asked Helen Smith as to what was said to her by her husband relative to Barlow and Musser were in the nature of communications which are confidential under the provisions of Sec. 104-49-3 (1), U. C. A. 1943. However, that does not avail the defendants because: first, no objection was made on the grounds of privileged communication; second, such objection is only available to the other spouse; and third, Heber C. Smith, the husband, is not one of the twenty defendants as to whom we hold there is evidence enough to go to the jury.

I think the opinion is in error on the question involving the competency of certain jurors. To my mind the record compels the conclusion that the trial court was in error in denying the challenge of defendants to such jurors. I fear the effect of the holding of the opinion will be to render any talesman competent to sit as a juror if he says he will try the case fairly and impartially even though he has a fixed and determined opinion of defendant's guilt or of his innocence as unmovable as Gibraltar. During the examination of talesman as to his qualifications to sit as a juror, when the talesman stated that he had formed an opinion as to the merits of the case, the court asked: "Is it such an opinion

that it would not yield to the facts presented here in the court room before you for your consideration?" The talesman answered: "It would take evidence to change my opinion." The court then asked: "The opinion you now have, could the opinion you now have be removed by evidence you heard in this court, and altered and changed?" And the answer was: "Yes, by evidence it could." The challenge to the juror was denied.

Another talesman who had formed an opinion on the merits stated that "it could be changed; as the case went on, it could be changed." Challenge to such juror was also denied. At least three jurors were of this type. It seems elemental to the writer that a talesman who has an opinion on the question to be decided by the jury, which opinion requires evidence to change or remove, is ipso facto disqualified as a juror. Of course, jurors are not required to be blank minds, but they should be men with free and open minds; men who can enter the jury box at the beginning of the evidence utterly disregarding and oblivious to any thing they may have heard or read, or any opinions or impressions they have formed. The question is not: Can your opinion be changed, but can you utterly disregard your opinion? It is not as to whether the opinion is of such fixity that it cannot be changed by evidence, but is it of such fixity that you cannot disregard it without any evidence? As far as [fol. 77] such juror is concerned the party litigant comes to the batter's box with two strikes charged against him. It is small consolation to say: "If you knock a home run on the first ball pitched, the handicap of two strikes against you before you came to bat didn't hurt you." Who would contend that in a championship basket ball game it is fair to give one team, as the game opens, ten free throws at the basket, saying to the other team: "If you can score enough field baskets more than your opponents to offset the ten free throws, why you win anyway so you can't complain?"

The rule as laid down by the overwhelming weight of authority, and as repeatedly declared in this jurisdiction is, a talesman is not disqualified as a juror because he has formed or expressed an opinion as to the guilt or innocence of the accused if such opinion is one that the juror can and will completely lay aside and disregard so he can try the case fairly and impartially upon the evidence submitted in open court like he would if be had heard nothing of the case or formed no opinion whatever. In People v. Hopt, 4 Utah

247, 9 P. 407, 120 U. S. 430, 7 S. Ct. 614, 30 L. Ed. 708, the question was raised as to a denial of a challenge of a juror for implied bias. The Utah court disposed of the matter on the ground that when the jury was sworn the defendant had three unused peremptory challenges and so could not complain. The United States Supreme Court affirmed on the same ground. It should be borne in mind that both courts point out that the juror, Abbott, testified that while he had long before formed an opinion based upon what he read in the newspapers "he could go into the jury box and sit as if he had never heard of the case" and that unless "what he had heard before turned out to be the facts in the case he had no opinion, and that he could sit on the jury and try the case without reference to anything he had heard." In Thiede v. Utah, 159 U. S. 510, 40 L. Ed. 237, 16 S. Ct. 62, the court disposes of the question thus: "These jurors testified substantially that at the time of the homicide they had read accounts thereof in the newspapers, and that some impression had been formed in their minds from such reading, but each stated that he could lay aside any such impression and try the case fairly and impartially upon the evidence." In State v. Haworth, 24 Utah 398, 66 P. 155, four of the challenged jurors had formed no opinion as to the guilt or innocence of the accused. It did appear they had formed an opinion that deceased had been murdered. (A point on which there was no dispute.) One juror stated that from what he had read he had formed an *opinion or impression* as to the guilt or innocence of the accused, but that he could *weigh the evidence independently of what he* [fol. 78] *had read and heard* and would not be influenced by such matters or opinions formed therefrom. These jurors were held not disqualified. They all come with the rule for which the writer is contending.

> "A person who has formed an opinion by conversation with witnesses is, under Neb. Crim, Sec. 468, incompetent to sit as a juror, notwithstanding he may swear that he can render a fair and impartial verdict." Cowan *v.* State, 22 Neb. 519.
>
> "A juror is not disqualified because he has formed an opinion of greater or less strength from what he has read in newspapers, if he testifies that he can render a verdict according to the evidence, uninfluenced by previous opinions." Rizzolo v. Com., 126 Pa. 54; West v.

State, 79 Ga. 773; Garlitz v. State, 71 Mo. 293, 4 L. R. A. 601; People v. Gage, 62 Mich. 271.

"A juror having an opinion in a case, and whose declaration that he could render an impartial verdict is qualified by a doubt, is incompetent, under N. Y. Code Crim. Proc., Sec. 376." People v. McQuade, 110 N. Y. 284, 1 L. R. A. 273.

"A juror stating that he is prejudiced in defendant's favor, but that he can find a verdict upon the evidence alone, is properly rejected on a challenge for cause." Giebel v. State, 28 Tex. App. 151.

"The statement of a juror on cross-examination, that he thinks he can try the case fairly and impartially and render an impartial verdict from the evidence, without being biased by his previously formed opinion, although it will take evidence to remove it, renders his rejection a matter within the discretion of the trial judge." Young v. Johnson, 123 N. Y. 226, affirming 46 Hun. 164.

"The opinion which renders a juror incompetent must be such as would influence his judgement." Spangler v. Kite, 47 Mo. App. 230.

"A juror called in a murder case is not incompetent because he heard talk about the case at the time of the offense, and may then have had opinion, where he stated that *he has no opinion at the time of the trial,* stands impartial, and can give the prisoner a fair trial." Lyles v. Com., 88 Va. 396. (Italics ours.)

"One who has formed an opinion which it will require evidence to remove is disqualified for actual bias as a juror in a murder trial, although he states that he will try the case on the evidence and the law." State v. Coella, 3 Wash. 99; contra. Com. v. McMillan, 144 Pa. 610.

"A juror who has formed and expressed a positive opinion of the guilt of a prisoner, and of certain specific and material facts, although it is based solely on newspaper accounts, is disqualified, even if he declares that he can render a fair and impartial verdict upon the evidence alone." Coughlin v. People, 144 Ill. 140, 19 L. R. A. 57.

(Above quotations 40 L. Ed., pages 238, 239.)

We quote from the syllabus in Scribner v. State (Okla.) 108 P. 422:

"The opinion necessary to disqualify a juror must be one based on what purports to be facts, and one that will combat the evidence.

"The trial court is not limited by the answers made by the juror, but must be satisfied from all of the circumstances as well as the examination that the juror is not prejudiced against the accused.

"Where the juror says that he has an opinion, the accused should be given an opportunity to examine him fully as to the extent of his opinion."

[fol. 79] In the concurring opinion of Mr. Justice Furman, we read:

"When a juror states that he had an opinion as to the guilt of a defendant, he is not made competent to sit in the case merely because he may state that he can and will lay this opinion aside if taken on the jury, and give the defendant a fair and impartial trial, and be governed alone in making up his verdict by the testimony of the witnesses and the charge of the court. The juror is not the judge of his own competency, of his own impartiality, and of his own freedom from prejudice. No statute can clothe him with such judicial discretion and power. . . . It is the judge, and not the juror, who is charged with the duty of passing upon the competency of the juror, and in the discharge of this duty the judge may have recourse to any means of information within his power. In fact, he should carefully investigate every source which would be calculated to throw any light upon the competency of a juror, and if the judge is not entirely satisfied of the competency of the juror, he should be excused. In re Johnson v. State, Okla. Crim. 348, 97, P. 1070.

". . . . The court erred in not permitting this question to be answered. While it is true that the court would not be bound by answers of the juror, yet, when it is disclosed that a juror has an opinion, in all fairness the court should permit the most searching cross-examination of the juror as to the origin, extent and probable effects of such opinion. . . . But it may be said that the defendant is guilty, and that therefore it is immaterial

as to whether the law was complied with. Such a statement as this is the first step toward lynch law, and if recognized by this court, would wipe out and destroy every constitutional right, and would establish a precedent which, if followed, would result in arbitrary punishment in the name of the law, ..."

The question as to the juror's qualification is not if his opinion will yield to evidence but, can he lay it aside and disregard it so as to give the evidence its proper weight on the question: Is guilt proved? without wasting part of its strength and force in overcoming preconceived opinions on that matter? In other words, not can the opinion be overcome by evidence, but can and will the juror disregard such opinion and weigh the evidence fairly and impartially? I think the trial court erred in turning down the suggestion and request of defense that the state of mind of these jurors, and the fixity of their opinion be further explored before they be accepted as jurors. On the record as it stands, I think these jurors were disqualified and incompetent to sit as jurors, and the cause should be reversed.

There are two other matters in the record I think were error but since no exception was taken to them below, they need not be discussed.

Pratt, Justice; not participating.

[fols. 79a-95] IN THE SUPREME COURT OF THE STATE OF UTAH

Regular October Term, 1946

No. 6816

THE STATE OF UTAH, Respondent,

v.

JOSEPH WHITE MUSSER, et al., Appellants

JUDGMENT—December 16, 1946

This cause having been heretofore argued and submitted and the court being sufficiently advised in the premises, it is now ordered, adjudged and decreed that the judgment of conviction against Joseph White Musser, Guy W. Musser,

Charles Frederick Zitting, Heber Kimball Cleveland, Zola Chatwin Cleveland, Jonathan M. Hammon, Ross Wesley LeBaron, John Y. Barlow, Albert Edmund Barlow, Edmund Francis Barlow, Ianthius Barlow, Louis A. Kelsch, Dr. Rulon Clark Allred, David B. Darger, Rulon T. Jeffs, George H. Kalmar, Joseph Lyman Jessup, and Alma A. Timpson, be, and the same is, affirmed; the judgment of conviction against Juanita Barlow and Jean Barlow Darger is set aside with instructions to transfer the case as to them to the Juvenile Court. It is further ordered that the judgment against the remaining defendants be, and the same is, reversed with directions to dismiss as to them.

[fols.95A-96] IN THE SUPREME COURT OF THE STATE OF UTAH
REGULAR FEBRUARY TERM

No. 6816

THE STATE OF UTAH, Respondent,

v.

JOSEPH WHITE MUSSER, et al., Appellants

ORDER DENYING REHEARING—February 18, 1947

On consideration of the petition for rehearing heretofore filed herein and the arguments of counsel thereupon had, it is now ordered that a rehearing be, and the same is, denied.

[fol. 97] [File endorsement omitted]

IN THE SUPREME COURT OF UTAH

[Title omitted]

PETITION FOR APPEAL—Filed February 19, 1947

Come now the foregoing named appellants and state, that on the 16th day of December, 1946, the Supreme Court of the State of Utah entered a final decision affirming their conviction by the Court below, and, thereafter, to wit, on the 18th day of February, 1947, it denied a petition for rehearing in said cause; and the appellants, feeling ag-

grieved at the decision of the Supreme Court of the State of Utah, affirming said judgment of conviction, pray that they may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and decision, and that a transcript of the record in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

The petitioners submit and present to this honorable Court herewith a statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in this cause.

[fols. 98-113] Joseph White Musser, Guy W. Musser, Charles Frederick Zitting, Heber Kimball Cleveland,, Zola Chatwin Cleveland, Jonathan M. Hammon, John Y. Barlow, Albert Edmund Barlow, Edmund Francis Barlow, Ianthius Barlow, Louis A. Kelsch, Dr. Rulon Clark Allred, David B. Darger, Jean Barlow Darger, Rulon T. Jeffs, George H. Kalmar, Joseph Lyman Jessup, Alma A. Timpson, By Claude T. Barnes, Counsel for Appellants and Petitioners.

[fol. 114] [File endorsement omitted]

IN THE SUPREME COURT OF UTAH

[Title omitted]

ASSIGNMENTS OF ERROR—Filed February 19, 1947

Come now the foregoing appellants by their attorney of record, and assign that in the final decision of the Supreme Court of the State of Utah, rendered in said cause on December 16, 1946, on which rehearing was denied on the 18 day of Feb., 1947, there is manifest error against the just rights of all of the said appellants, in this, to wit:

1

Contrary to the provisions of Amendments 1 and 14 to the Constitution of the United States, the Court has decided:

(a) That one may not *advocate* the practice of a religious belief in a plurality of wives.

(b) That one may not *teach* the practice of a religious belief in a plurality of wives.

(c) That one may not *counsel* the practice of a religious belief in a plurality of wives.

(d) That one may not *advise* the practice of a religious belief in a plurality of wives.

[fol. 115] (e) That one may not *urge* other persons to practice a religious belief in a plurality of wives.

(f) That one may not with others establish a church in which original Mormonism is advocated, including among many religious doctrines, the tenet, that a plurality of wives is essential to exaltation in the celestial kingdom of God; nor may citizens peaceably assemble thereat to express and advocate views.

(g) That it is unlawful to read from the Doctrine and Covenants, (a Mormon religious work which has been published for a hundred years) the 132nd Section, which states that a plurality of wives is essential to salvation; and to assert that such is the commandment of God applicable today.

(h) That it is unlawful to publish a religious book, pamphlet or magazine setting forth the belief that it is necessary to practice having a plurality of wives now to gain celestial glory.

(i) That to do any of the foregoing with others is a conspiracy against public morals.

(j) It has failed to distinguish between the advocacy of a religious belief and the actual practice thereof.

(k) It has denied the defendants the right of assembly in a house of worship wherein their belief in a divine commandment of a plurality of wives was expressed only incidentally in their general Christian worship.

(l) It has held that "an agreement to advocate, teach, counsel and advise other persons" to practice polygamy is an agreement to commit acts injurious to public morals.

(m) It has disregarded United States v. Barlow, 56T, Supp. 795; 323 U. S. 805, 65 S. Ct. 25, (all of whose defendants except one are included among the defendants here), wherein the Federal Court decided that to urge, teach and advocate the practice of plural marriage is not injurious to public morals. That case is virtually *stare decisis* here, but

the conclusions are directly opposite in the same jurisdiction; and freedom of the press is at stake. Is it a crime to read the Doctrine and Covenants, which has been published in Utah for a hundred years, and claim that its doctrines are applicable now?

(n) The Court has furthermore, held that prospective jurors with fixed opinions against the defendants, and members of a church fighting the defendants are nevertheless not subject to peremptory challenge if they state that their opinion, fixed as it is, could be overcome by evidence, all of [fols. 116-119] which denied the defendants due process of law under the Constitution of the United States Amendment 14, and Article 5.

(o) Disregarding the lessons of American history, when sects are advocating "healers" instead of doctors, even in cases of contagious disease, this Court has said that one may not advocate, teach, counsel, urge or advise a religious practice and belief. The first and the fourteenth amendments to the Federal Constitution droop before such an assertion.

(p) The rights of freedom of worship, assembly, speech, and press, are by this decision assailed; and due process of law in the selection of jurymen has been flagrantly denied.

Claude T. Barnes, Counsel for Appellants.

[fol. 120] [File endorsement omitted]

IN THE SUPREME COURT OF UTAH

[Title omitted]

ORDER ALLOWING APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed February 19, 1947

This cause having come on this day before the court on petition of all the foregoing Appellants, claiming right to appeal to the Supreme Court of the United States for reversal of the final decision of this Court rendered December 16, 1946, and a denial of a petition for rehearing thereon entered February 18, 1947, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States; and the Court having heard and considered said petition, together with the appel-

lants' statement showing the basis of the jurisdiction of the Supreme Court of the United States to entertain an appeal in said cause, the same being duly filed with the Clerk of this Court, it is, therefore, by the Court ordered and adjudged, that the Appellants herein be and they are hereby allowed an appeal from the final decision and judgment of this Court affirming the judgment of the Court below, to the Supreme Court of the United States, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of Washington, D. C.

[fols. 121-125] It is further ordered that the appellants be and they are hereby permitted a period of sixty days in which to file the record and docket the said appeal to the Supreme Court of the United States.

In consideration of the allowance of said appeal and the fact that the bonds already filed by the appellants are continuing bonds covering appeal until final judgment, it is further ordered that the said writ shall operate as a stay of the sentences and judgments upon the appellants heretofore imposed by the District Court of the Third Judicial District of Salt Lake County, State of Utah, until the further order of this Court.

It is further ordered that the defendants give security for costs in the amount of $750.00.

Dated at Salt Lake City, State of Utah, this 19th day of February, 1947.

Roger I. McDonough, Chief Justice of the Supreme Court of the State of Utah.

[fol. 126] [File endorsement omitted]

IN THE SUPREME COURT OF UTAH

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed March 7, 1947

To L. M. Cummings, Esq., Clerk of the Supreme Court of the State of Utah:

You are hereby requested to make a transcript of the record in the foregoing cause, to be filed in the Supreme Court of the United States pursuant to the allowance of an

appeal by the Chief Justice of the Supreme Court of Utah, and include in such transcript of record the following:

1. Information.
2. Motion to Quash.
3. Order Denying Motion to Quash.
4. Defendants' Motion to Dismiss as to All Defendants.
5. Defendants' Requests Nos. 16, 24, 36, 42. (No others).
6. Court's Instructions, No. 1, the last paragraph of No. 4, No. 5, No. 9. (No others).
7. Verdict.
8. Notice of Motion for New Trial.
9. Motion for Judgment of Not Guilty Non Obstanto Veredicto (copy only one).
10. Judgment of the Court.
11. Notice of Appeal.
12. Copy the following assignments of error taken from Appellants' Brief: 1, 9, 11, 14, 15, 18, 20, 21, 25, 30, 34, 36, 37, 38, 74, 177-186.

[fols. 127-129] 13. Opinion of the Supreme Court.

14. Judgment of the Supreme Court.
15. Petition for Rehearing.
16. Petition for Appeal to Supreme Court of the United States.
17. Statement of Jurisdiction.
18. Assignment of Error.
19. Minute Entry Showing Cost Bond ($750) Filed and Approved by Chief Justice.
20. Order Allowing Appeal.
21. Citation.
22. Notice and Service on Attorney General.
23. This Praecipe for Transcript of Record.
24. Certificate of Clerk.

Also please make the following quotations from the official Court Reporter's transcript of the trial and proceedings. (The numbers refer to the page numbers of his official transcript):

Page 80—Copy from the — on p. 80 to — p. 88.

P. 136—Copy from the — on p. 136 to the — on p. 140.

P. 486 and down to the — on p. 500.

P. 577 from — to — on p. 580 (direct examination of Helen G. Smith).

Cross examination of Helen G. Smith from — on p. 632 to end of p. 643.

Wherever motions by individual defendants are alike in wording, one copy will suffice, with that notation.

Said transcript of record should be prepared as required by law and the rules of this Court and the rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States within the time permitted by law after the order allowing the appeal.

Dated this 5th day of March, 1947.

Claude T. Barnes, Counsel for Appellants.

Service of the foregoing praecipe acknowledged this 7th day of March, 1947:

Grover A. Giles, Attorney General of Utah. By Ethel Leonard.

[fol. 130] APPENDIX ATTACHED TO THE RECORD

UNITED STATES DISTRICT COURT, DISTRICT OF UTAH, CENTRAL DIVISION

No. 14479

Criminal

UNITED STATES OF AMERICA, Plaintiff,

v.

JOHN Y. BARLOW, et al., Defendants

MEMORANDUM OPINION ON DEFENDANTS' MOTION TO QUASH INDICTMENT

This matter is before me on defendants' motion to quash the indictment. Several grounds are set forth. Being of the opinion that the first ground, to wit, that the indictment be quashed and set aside because it does not state a Federal offense, is good, it will not be necessary to discuss other grounds set out in the motion.

The indictment charges a group of defendants with conspiring to commit an offense against the United States, Sec. 88, Tit. 18, U.S.C.A. (Sec. 37 Crim. Code). The object of the conspiracy as charged is to violate Sec. 334, Tit. 18, U.S.C.A. (Sec. 211 Crim. Code), as amended, which denounces as a crime the mailing of obscene matter, and is in part as follows:

> "Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publications of an indecent character, * * * is hereby declared to be nonmailable matter * * *. Whoever shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared by this section to be nonmailable * * * shall be fined * * *," etc.

The facts alleged in the indictment are: The defendants in order to carry out the conspiracy after it was formed, mailed out to certain parties named copies of a publication entitled "Truth," published monthly by the Truth Publishing Company in Salt Lake City. By agreement of counsel several editorials from this publication of different months —which form the gravamen of the Government's case and which it claims contain nonmailable matter under the above statute—were submitted to the court on the understanding they constitute the proof that the Government would offer [fol. 131] in support of the charges. These editorials simply advocate the restoration of "celestial or plural marriage," stating that the Lord has restored the principle thereof.

A sample editorial from said publication for the month of April, 1943—which the Government says is typical of all and which it is claimed is within the prohibition of the statute as being lewd, lascivious and filthy—is as follows:

> "The Lord restored the principle of Celestial or plural marriage in line with His promise that in this the last dispensation there would be a restitution of all things and that there should be no taking away again. Plural marriage is one of the laws of Heaven that has been restored never again to be taken from the earth or given to another people. It is a law that cannot be abrogated, modified, or postponed. The hackneyed claim that the Woodruff Manifesto of 1890 was given by revelation

from the Lord to abrogate His law of Plural Marriage has been exploited by the leaders to a shocking degree, and as often has been exploded. Any person with 8th grade intelligence reading the Manifesto will discover nothing in it savoring of revelation, or as an injunction from the Lord against the continued practice of the principle. True, the subsequent interpretation given it by Wilford Woodruff, while under pressure by the enemy, and so far as it was ratified by the Church, bound the Church to a monogamic marriage system. But it was the Church that was bound, and not God."

The statute in question provides that the obscenity, lewdness or lasciviousness be contained in a book pamphlet, picture, paper, letter, writing, printing or other publication and be of an indecent character.

The argument of the Government, as I understand it, is that these editorials—of which a fair sample is the quotation supra—by advocating the practice of polygamy, comes within the definition found in *Swearingen* v. *U. S.* 161 U. S. 446, p. 451,

> "The words 'obscene,' 'lewd,' and 'lascivious' as used in the statute signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel * * * ."

In other words it is a violation of the law to advocate through the mails plural marriages, because in so doing the defendants necessarily advocate the violation of law and incite thoughts of sexual impurity and practices in many of their readers.

A careful reading of the editorial discloses no obscene or filthy word or expression of lewd suggestion is used or contained therein. It is restrained and nothing more than an argument in favor of a practice that for many years was a tenet of the Mormon Church, until abolished as a condition [fol. 132] of the admission of Utah to statehood. I cannot see how any word or sentence in these editorials submitted to the court can be denominated as lasciyious, or of a nature to excite erotic feelings or thoughts in the mind of the ordinary reader, or as tending to deprave public morals, or lead to impure purposes or practices.

As stated in *Knowles* v. *U. S.*, 170 Fed. 409:

> "* * * the only question before us is whether the article is obscene, lewd, or lascivious within the meaning of the statute." That: "In all indictments under this statute there is a preliminary question for the court to say whether the writing could by any reasonable judgment be held to come within the prohibition of the law."

P. 412:

> "The true test to determine whether a writing comes within the meaning of the statute is whether its language has a tendency to deprave and corrupt the morals of those whose minds are open to such influences, and into whose hands it may fall, by arousing or implanting in such minds obscene, lewd or lascivious thoughts or desires."

In the *Swearingen* case, 161 U. S. (supra), the defendant, a publisher, was indicted for having mailed copies of his newspaper containing an article that was a very bitter personal attack upon a person described, describing him in the most abusive terms, i.e.:

> "a mental and physical bastard, a black hearted coward, a liar, perjurer, and slanderer, who would sell a mother's honor with less hesitancy and for much less silver than Judas betrayed the Saviour. Time and again has he proven a wilful, malicious and cowardly liar."

The Supreme Court held that the article in question was not obscene and non-mailable, the Court saying, p. 450:

> "The offense aimed at, in that portion of the statute we are now considering, was the use of the mails to circulate or deliver matter to corrupt the morals of the people. The words 'obscene,' 'lewd,' and 'lascivious,' as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. *As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.*" (Emphasis ours).

The court held that the whole article was exceedingly coarse and vulgar. It could not perceive anything in it of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the minds and morals of those in whose hands it might fall.

A reading of the publication here involved forces us to the same conclusion. As stated, it is nothing more than advocacy of a certain practice that was once part of the religion of the Mormon Church, and which this group of [fol. 133] defendants still advocates. There is nothing in it that comes within the language of the Swearingen case, or which tends to corrupt and debauch the minds and morals of those in whose hands it might fall.

The Supreme Court passed upon this same statute later in U. S. v. Limehouse, 285 U. S, 424, wherein the defendant was charged with sending out certain filthy letters and writings through the mails, containing charges of sexual immorality and miscog-nation and similar practices. The Court found the language was coarse, vulgar and unquestionably filthy within the popular meaning of that term, and following the Swearingen case (supra), held that in order to constitute a crime the language must be

> "calculated to corrupt and debauch the mind and morals of those in whose hands it might fall."

In McKnight v. U. S. 78 Fed (2d) 931, it was held (syllabus 2):

> "Court in considering indictments under statute prohibiting mailing of libelous and indecent matter must first determine as matter of law whether writing complained of could by any reasonable judgment be held to come within prohibition of law."

And the statute being penal must be strictly construed.

The court takes judicial notice that the Mormon Church for many years advocated polygamy, and in so doing used the mails to disseminate its literature, advocating "celestial or plural marriages". Such a use of the mails has continued for many years without molestation, and has never before been questioned. In the interpretation of a doubtful and ambiguous statute—a uniform administration practice by the authorities in respect thereto over a considerable period of time carries weight with the court,

especially where, as here, thousands of good citizens sincerely and honestly believe in it as part of their religion.

It was quite natural that when the Congress forbade plural marriages and the church agreed to submit to those laws many of the follows of the Mormon faith felt that they could not conscientiously and sincerely change their beliefs in the face of what they considered the direct command of God to the contrary. The constitution of Utah prohibits polygamous or plural marriages. It might well be said that any prosecution for violations thereof under our theory of government is a purely local matter for the state rather than the Federal Government, in the absence of a widespread violation of the law.

In conclusion, it might be said that the natural reaction [fol. 134] to reading a publication setting forth that polygamy is essential to salvation is one of repugnance and does not tend to increase sexual desire or impure thoughts. We also bear in mind that one cannot pick up a national magazine, or go to the theatre or movie without being confronted with illustrations and advertisements that tend more to incite sexual desire than do any of the publications in this magazine that have been called to our attention. In fact sex incitement is a selling point of innumerable publications and advertisements that pass without comment or prosecution.

It follows that the motion to quash the indictment should be granted and the indictment dismissed, and

It Is So Ordered:

J, Foster Symes, U. S. District Judge Assigned Sitting Within and For the District Court of the United States for the District of Utah, Central Division.

March 18, 1944.

[fol. 135] IN THE SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed March 31, 1947

The Appellants adopt their Assignments of Error (Record 0114) as Their Statement of Points.

It will *not* be necessary to print the following: Appeal Bond (R. 0117); Certificate of Clerk (0128); Citation On

Appeal (0122); Judgment of the Supreme Court of Utah (0080); Notice of Appeal to Utah S. Ct. (0050); Notice to Attorney General (0124); Verdict of Jury (0043); Order (0005); Judgment (0048).

The Exhibit at the end of the Record, containing the opinion of Hon. J. Foster Symes, U. S. Dist. Court, in a similar case in the Federal Court against the same (in most part) defendants should be printed.

Claude T. Barnes, Counsel for Appellants.

Received copy this— day of March, 1947.
Grover A. Giles, Attorney General of Utah By
——— ———.

[fol. 136] Affidavit of Service

STATE OF UTAH,
County of Salt Lake, ss:

Royal C. Barnes being first duly sworn deposes and says That I am employed in the office of Claude T. Barnes, Salt Lake City, Utah; that on the 26th day of March, 1947, I placed a copy of the attached Statement of Points in an envelope addressed to Hon. Grover A. Giles, Attorney General of the State of Utah, State Capitol, Salt Lake City, Utah; and placed the same with postage fully prepaid thereon in the United States postoffice at Salt Lake City, Utah. There is a daily mail service between the place of mailing and the State Capitol.

Royal C. Barnes.

Subscribed and sworn to before me this 26 day of March, 1947. Claude T. Barnes, Notary Public. My Commission Expires June 29, 1949. Residing at Salt Lake City, State of Utah. (Seal.)

[fol. 137] IN THE SUPREME COURT OF THE UNITED STATES

SUPPLEMENT TO STATEMENT OF POINTS—Filed March 31, 1947

The Appellants do not deem it necessary for the Clerk to have printed the Petition for Rehearing and Citation of Authorities thereon, filed before the Supreme Court of the State of Utah.

Claude T. Barnes, Counsel for Appellants.

STATE OF UTAH,
County of Salt Lake, ss:

Royal C. Barnes being first duly sworn deposes and says: That I placed a copy of the foregoing Supplement to Statement of Points in an envelope addressed to Hon. Grover A. Giles, Attorney General of the State of Utah, State Capitol, Salt Lake City, Utah, and on the 27th day of March, 1947, deposited the same with postage fully prepaid in the United States Post Office in Salt Lake City, Utah, from which point there is a daily mail service to the State Capitol.

Royal C. Barnes.

Subscribed and sworn to before me this 27 day of March, 1947. Claude T. Barnes, Notary Public. My Commission Expires June 29, 1948. Residing at Salt Lake City, State of Utah. (Seal.)

[fol. 137a] [File endorsement omitted.]

[fol. 138] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—April 28, 1947.

The statement of Jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on cover: Enter Claude T. Barnes, File No. 52,052, Utah, Supreme Court, Term No. 1188. Joseph White Musser, Guy. W. Musser, Charles Frederick Zitting, et al., Appellants, vs. the State of Utah. Filed March 31, 1947, Term No. 1188, O. T. 1946.